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BESLISSINGEN VAN DE NATIONALE APPELRAAD

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DECISIONS OF THE NATIONAL APPEAL BOARD

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To summarise, plaintiff's claim to have the marriage set aside must fail because—

(*a*) (*Paragraph 7 of Particulars of Claim*) his knowledge of and consent to the marriage were not a lawful requirement, as at the date of marriage his daughter was 22 years of age and therefore a major;

(*b*) (*Paragraph of Particulars of Claim*) Section 2 of Law No. 3 of 1897 of the Transvaal did not confer on plaintiff the right to refuse consent to the marriage. In terms of this law no "consent" is required;

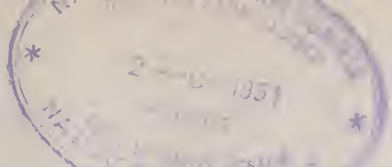
(*c*) plaintiff has not shown that he had the exclusive right to grant the enabling certificate that according to law there was no hindrance to the proposed marriage;

(*d*) non-payment of dowry is not an impediment, according to law, to a proposed marriage.

Judgment is granted in favour of defendants with costs.

For Plaintiff: Mr. Helman of Messrs. Helman & Michel, Johannesburg.

For Defendant: Mr. Susser, of Messrs. Behrman & Behrman, Johannesburg.



SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT

CENTRAL DIVISION
1950

VOLUME I

Part III

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DEFAULT JUDGMENT: RESCISSION.

CASE No. 1 OF 1950 (JOHANNESBURG).

MISAEL MORANMOHOLO *v.* **PRISCILLA MORANMOHOLO.**

JOHANNESBURG: 17th February, 1950. Before H. F. Marsberg, Esq., President, and Messrs. D. J. S. Visser and F. P. van Gass, Members of the Court (Central Division).

Default judgment—Application to rescind refused—Appeal.

Claim: Application to rescind default judgment.

Plea: Nil.

Judgment: Application refused.

Appeal:

1. (1) The Native Commissioner erred in Law in refusing the application.
   (2) That the Native Commissioner erred in Law in holding that the original judgment was not void *ab origine*.
   (3) That the Native Commissioner exercised his discretion wrongly in refusing to allow the application for rescission, in view of the fact that the judgment involved a question of status.
   (4) That the Native Commissioner erred in the facts in holding that the application for rescission of judgment was out of time.
2. Appeal against the merits of the default judgment.

Held:

(1) As record discloses good *prima facie* defence based on Native Law Application to rescind should have been allowed.
Wilful default of defendant not clearly established.

(2) Defaulting defendant cannot appeal against merits of default judgment.

If pleadings *prima facie* disclose that default judgment could be successfully attacked that fact may be taken into consideration in deciding whether rescission should be allowed.

Authorities:

Bobotyana *v.* Jack, 1944 (C. & O.), 9.

George Mallapo *v.* J. Sisana, 1945 (T. & N.), 58.

Marsberg (President), delivering the judgment of the Court:—

In the Native Commissioner's Court at Johannesburg, plaintiff, Priscilla Moranmoholo, duly assisted by her father and natural guardian sued defendant, Misael Moranmoholo, for an order declaring the customary union between herself and defendant cancelled. The particulars of claim allege:—

1. On or about the 7th February, 1945, plaintiff and defendant entered into a customary union at Johannesburg.
2. On or about the 15th January, 1946, and on subsequent occasions, defendant informed plaintiff and others that he had abandoned her and that he is no longer married to her and that he had married another woman by Native Custom.
3. Since the 15th January, 1946, the defendant has not been living together with the plaintiff as man and wife.

As the summons stands we are unable to see a cause of action. The case appears to be on all fours with the case of Bobotyane *v.* Jack, 1944, N.A.C. (C. & O.), 9. See pages 64 and 65 of Whitfield's *South African Native Law*.

The summons is dated 3rd December, 1948, and called on defendant to appear before the Court at 9.30 a.m. on 22nd December, 1948. The Messenger effected service on defendant on the 18th December, 1948. There was therefore short service of the summons. On 22nd December, 1948, when the case came before the Court the defendant was in default. The record does not disclose that plaintiff's attorney drew the Court's attention to the defective service. The case was postponed to 5 January, 1949, on which date defendant was again in default. Plaintiff's attorney informed the Court that defendant was defending the matter and the case was set down for hearing on 8 March, 1949. On 8th March, 1949, the record contains the bald statement that " By consent postponed to 29/4/49 ". The appearances for the parties are not recorded.

On 29th April, 1949, plaintiff was represented by his attorney and defendant was in default. Plaintiff gave evidence and judgment was given " By default, judgment for plaintiff as prayed with costs."

On 15th August, 1949, defendant made application to be heard on 24th August, 1949, for rescission of the default judgment. In the affidavit supporting the application defendant alleged that he had gone to plaintiff's attorney and explained to him the defects in the summons, based virtually on the principles of Native Law enunciated in Bobotyane's case and expected plaintiff to issue a fresh summons and expected him to place the facts before the Court.

On the 24th August, 1949, defendant appears to have been before the Court and was represented by an attorney. Plaintiff appears to have been absent but was represented by her attorney. By consent the application was postponed to 13th October, 1949.

On 13th October, 1949, plaintiff was represented by her attorney and defendant appeared in person. Plaintiff opposed the application for rescission of the default judgment but defendant stated " I am unable to say anything unless my attorney is present. I don't know where my attorney is."

The Native Commissioner refused the application for rescission on the reasons advanced.

Defendant has noted an appeal on two grounds, firstly against the refusal of the Native Commissioner to rescind the default judgment and secondly, on points of law, against the default judgment itself.

Now, a defendant who has been in default cannot appeal against the merits of a default judgment. His only remedy is to bring himself before the Court by way of application to have the default judgment rescinded. In additoin to explaining his absence from Court, he must in his application indicate that he has a good ground of defence to the action. In support of this he can refer to defects in plaintiff's summons. The judicial officer would consider these points to ascertain whether there was a bona fide defence to the action. But the prime responsibility is for defendant to establish a reasonable explanation of his absence from Court. Defendant's reasons for his absence from Court are contained in his affidavit in support of his application for rescission of the default judgment. While his action in going to plaintiff's attorney may not be an excuse for failing to attend Court, it was a circumstance which could have been taken into account in considering whether his absence from Court was wilful. We think that defendant could reasonably have been given the benefit of the doubt on this score. In his reasons for judgment the Native Commissioner has stated that he refused to rescind the default judgment because *inter alia* defendant had allowed an unreasonable time to elapse (four months) before

applying for rescission and the Court is so pressed with work that it cannot wait indefinitely for an attorney to make his appearance before it. In the latter regard he is quite correct. Parties and their representatives must be in Court at the appointed time. Though defendant, in this case, declined to address the Court in support of his application, there was his affidavit before the Court which should have been taken into consideration. The Native Commissioner correctly declined to go into the merits of the default judgment but there were allegations in the affidavit which indicated that defendant had taken some action which discounted his wilful disregard of the Court proceedings. There is also the circumstance of short service of the summons which indicates that on 22nd December, 1948, defendant could not have been in wilful or unlawful default. On the face of the proceedings in this case there is every indication, as we have pointed out, that defendant could have a good defence to the action and in the circumstances he should have been given an opportunity to contest the case. The lapse of time in making application for rescission though undue has not, in the nature of this case, caused substantial prejudice. Altogether the proceedings disclose several irregularities which we cannot condone. There has been a neglect on both sides to place material facts before the Court and on the face of the process ignorance is disclosed of the principles of Native Law and in the form in which summons must be drawn.

The appeal will be allowed. The Native Commissioner's judgment refusing the application to rescind the default judgment is altered to read—

> "Application allowed. The default judgment granted on 29th April, 1949, is hereby rescinded. Leave is granted to plaintiff, if she so desires, to set down the action for trial on due notice to the defendant."

There will be no order as to costs either in this Court or the Court below. We make this order to indicate the displeasure of the Court at irregularities on both sides, as pointed out in the body of this judgment. Though we have extended indulgence to defendant for his absence from Court, we consider that he has been wanting in showing due respect to the process of the Court. But in order to avoid any possible miscarriage of justice we feel that the merits of the case should be submitted for trial.

For Appellant: Mr. G. H. Behrman, of Messrs. Behrman & Behrman.

For Respondent: Mr. E. Gordon of Johannesburg.

CUSTOMARY UNION: REFUND LOBOLA.

CASE No. 2 OF 1950 (JOHANNESBURG).

PETRUS NKOSI *v.* **ALFRED TSHAPA.**

JOHANNESBURG: 21st February, 1950. Before H. F. Marsberg, Esq., President, and Messrs. D. J. S. Visser and F. P. van Gass, Members of the Court (Central Division).

Agreement to contract customary union—£80 agreed upon as lobola of which £34 paid on account—Husband cannot recover lobola in whole or part if he has been proximate cause of the termination of union—Pretrial Conference—Procedure irregular.

Claim: Refund of £34 part lobola paid with costs of suit.

Plea: Admission and counterclaim of balance of lobola.

Judgment: For plaintiff as prayed in the sum of £34 and costs.

Appeal: Judgment is against the evidence and the weight of evidence—fact

Held:

(1) Plaintiff has not claimed return of his wife, which supports contention that he has repudiated her. In the circumstances he is not entitled to the return of his lobola and the appeal is allowed with costs. The Native Commissioner's judgment is altered to read: For defendant with costs.

(2) Pretrial Conference is irregular as section 1 of Government Notice No. 2253 of 1928—Native Commissioner's Court Rules—provides that all proceedings in courts of Native Commissioners must be conducted in open court.

Authorities:

Bobotjane *v.* Jack, 1944, N.A.C. (C. & O.), 9.

Section 1 of Government Notice No. 2253 of 1928.

Whitfield's *South African Native Law*, page 139.

Marsberg (President), delivering the judgment of the Court:—

In the Native Commissioner's Court at Johannesburg plaintiff Alfred Tshapa sued defendant Petrus Nkosi for payment of the sum of £34 on allegations that during 1947 plaintiff and defendant entered into an agreement for plaintiff to contract a native customary union with defendant's daughter, Elsie, that an amount of £80 was agreed upon as the lobola, that plaintiff paid to defendant £34 on account of lobola and that—

(*a*) Elsie has notified plaintiff that she no longer intends to become plaintiff's wife;

(*b*) alternatively, Elsie has deserted the plaintiff;

consequently, on either ground (*a*) or (*b*) plaintiff is entitled to a refund of the £34 lobola paid on account.

If the claim were limited to ground (*a*) above, and the facts of the case supported this allegation, plaintiff would be entitled to a refund of the lobola paid, because it is trite native law that dowry or lobola paid in contemplation of a native customary union remains the property of the payer until the union actually takes place.

But that is not the case on ground (*b*). The alternative allegation clearly presupposes that plaintiff and Elsie had been married, otherwise there could have been no desertion. The principles of native law governing the return of lobola after a customary union has been contracted are quite different. See the case of Bobotyane *v.* Jack [1944, N.A.C. (C. & O.) 9] and Whitfield's *South African Native Law*, page 139 *et seq.* The crisp questions which the Court would ask itself are quoted at the end of page 141, in brief: Whose conduct terminated the union? A husband cannot recover lobola in whole or part if he has been the direct or proximate cause of the termination of the union. Per contra, the dowry holder cannot retain the lobola where the woman has been the direct or proximate cause of the failure of the union.

To us the issue appears to have been decided on the assumption that no customary union had taken place in this case. Plaintiff's contradictory alternative claims do not indicate that he was sure whether he was married or not. The pleadings, however, established that there was agreement on the amount of lobola, viz., £80, that £34, a substantial amount, was paid on account. Defendant alleges and the evidence of both parties establishes that plaintiff and Elsie lived together as husband and wife for a short while. Though defendant purports to have deducted £10 as a fine because the parties lived together without his consent

there is no reference whatever in the evidence that any action was taken against plaintiff for damages for seduction and we feel that there are no grounds to support this claim. It has been alleged that there was no formal handing over of the woman. Handing over can be tacit, as in the case where lobola is accepted by the father and the parties are permitted to live together at the husband's home. Such is the position in this case. The essentials of a customary union are present and in our opinion a valid customary union was contracted.

The question then arises: Whose conduct has terminated it?

The evidence discloses that the parties were quarrelsome and that assaults took place. Plaintiff's attitude appears to be summed up when he says "I am returning the wife now because I find her to be different from the article I intended or expected". Elsie says: "I still want to marry plaintiff. People often quarrel and I am prepared to marry him despite that".

Plaintiff has the right to repudiate his wife, with consequent forfeiture of the lobola paid. We are not satisfied that plaintiff has proved that Elsie and defendant by their conduct have terminated the union. Plaintiff has not claimed the return of his wife, which must support the contention that he has repudiated her.

In the circumstances he is not entitled to the return of his lobola.

The appeal is allowed with costs and the Native Commissioner's judgment is altered to read: "For defendant with costs".

We observe that there is a note on the record in connection with a pretrial conference. In our opinion such procedure is irregular. According to section 1 of Government Notice No. 2253 of 1928—Native Commissioner's Court Rules—all proceedings in Courts of Native Commissioner must be conducted in open Court.

For Appellant: Mr. H. Helman of Messrs. Helman & Michel.

For Respondent: Mr. E. Gordon of E. Gordon, Johannesburg.

SEDUCTION AND PREGNANCY.

CASE No. 3 OF 1950 (GERMISTON).

MAC MBALELA *v.* P. THINANE.

JOHANNESBURG: 22nd February, 1950. Before H. F. Marsberg, Esq., President, and Messrs. D. J. S. Visser and F. P. van Gass, Members of the Court (Central Division).

Seduction and pregnancy—Whether amount paid was for seduction or lobola—Cohabitation took place at girl's father's home—No handing over of girl to seducer's family—Held not to be a formal handing over—Therefore amount paid was damages for seduction—By agreement of parties sole question for trial Court was whether amount paid was damages for seduction or payment of lobola—Detailed judgment entered—Sole question submitted to Court should have been answered simply "yes" or "no".

Claim:

(1) Return and delivery of wife Lydia or refund of the lobola paid, less abatement according to law.

(2) Custody of minor child; and

(3) Costs.

Plea: Denies agreement of lobola, but alleges damages were paid for seduction.

Judgment:

(1) Return of £18.

(2) Plaintiff is given custody of the child as claimed.

(3) Defendant to pay costs.

Appeal:

(1) On questions of fact.

(2) Bad in law and in conflict with Native Custom.

Held: On the questions submitted to the Court it is ruled that the money paid by plaintiff to defendant was damages for seduction and pregnancy of defendant's daughter.

On the order made for custody of a minor child, it is ordered that the child be restored forthwith to its mother by plaintiff. Plaintiff to pay costs.

Native Commissioner's judgment on questions of fact reversed.

Authorities:

Rex *v.* Dhlumayo and Another, S.A.L.R., June (2), 1948, page 677.

M. Morosi *v.* Helman, N.O., N.A.C. (Central Division), 1949, Case No. 7.

Ngwenya *v.* Mafole, N.A.C. (Central Division), 1950, Case No. 1.

Marsberg (President), delivering the judgment of the Court:—

In the Native Commissioner's Court at Germiston, plaintiff, Philemon Thinani, sued defendant, Mac Mbalela, for return of his wife Lydia, daughter of defendant or refund of lobola paid, less abatement according to law and custody of the minor child. Defendant denied that lobola had been paid for Lydia, but alleged that damages for her seduction and pregnancy had been paid by plaintiff. After a variety of proceedings before the Native Commissioner the position at the time of trial was that by consent the child named Mchabeni was by order of the Court left in the custody of plaintiff and by agreement between the parties the issue before the Court was confined to the question whether the agreement to pay £24 was in respect of lobola or damages for seduction. This issue should have been determined by a straightforward answer, one way or the other, to that question but nevertheless the Native Commissioner gave judgment as follows:—

On claim in convention:

For plaintiff.

1. For return of £18.
2. Custody of the child.
3. Costs.

On claim in reconvention:

1. For defendant in reconvention (plaintiff).
2. Costs (for defendant in reconvention).

On the pleadings it is not clear that a claim in reconvention was lodged, but apparently paragraphs 2 (*b*) and (*c*) of plea have been construed as such a claim. As we have pointed out no judgment should have been entered on the issues not placed before the Court for adjudication.

Defendant has appealed in person against the judgment on the grounds that it is against the evidence and the weight of evidence and is bad in law and in conflict with recognised Native Custom. Before us defendant was represented by counsil.

According to the evidence it is clearly established that plaintiff did in fact seduce and render pregnant defendant's daughter,

Lydia. There were talks and negotiations between the two families concerned. Certain moneys were paid over on behalf of plaintiff to defendant. On plaintiff's side it is claimed that the money was paid as lobola whereas defendant states that the money was received as damages for seduction and pregnancy. On the premise that seduction and pregnancy did in fact take place, the presumption would favour defendant's version that damages were the subject of discussion. If in such circumstances a customary union was proposed and agreed upon by the parties and a union did take place the damages would merge into lobola. There is, however, a heavy onus on plaintiff to prove that the parties agreed to the customary union. The amount actually paid over in this case is equivalent to the *quantum* which would have been payable in the event of a claim for damages for seduction and pregnancy rather than the higher amount which would be payable as lobola for a native customary union. The defendant is correct in stating that if the seducer wished to enter into customary union with Lydia he and his family must approach defendant for that purpose. There was no obligation on defendant to take the initiative in the matter. Plaintiff, of course, does allege that he married Lydia by native custom and that about August, 1947, defendant handed over Lydia to him as his wife. On this point, which is the vital point in plaintiff's allegation, the Native Commissioner found as a fact proved " that defendant allowed plaintiff to cohabit with his daughter before the child was born and thereby tacitly handed her over to plaintiff ". With this finding and reasoning we are, however, unable to agree. The utmost which the evidence could establish on this point is plaintiff's own statement that he lived with Lydia in *her father's own house* for about a year. All the witnesses agree that this is contrary to native custom. Now, it is one of the fundamentals of a native customary union that there shall be a handing over of the woman and handing over means the transfer of the woman from her family group to her husband's family group. In this instance there has been no such transfer or handing over. The Courts will not lightly assume a departure from custom. Departures from custom must be proved by the clearest evidence. On the evidence before us there is no proof whatever that plaintiff and defendant arranged the handing over of Lydia in the most unusual manner described by plaintiff, nor do we consider the circumstances justify the inference drawn by the Native Commissioner.

We, therefore, must hold that there was no handing over of Lydia and consequently there could have been no customary union between plaintiff and Lydia. On the issue put before the Court by the parties the Native Commissioner should have found that the money paid over was damages for the seduction and pregnancy of Lydia.

Unfortunately, during the course of these proceedings an order was made that plaintiff should have custody of the child, Mchabeni pending the decision on the main issue. As we have held that the ruling should have been given in favour of defendant it is necessary in the interests of the very young child that we must make a special order.

The appeal is allowed with costs. The Native Commissioner's judgment is set aside and the following judgment substituted:—

" On the question submitted to the Court it is ruled that the money paid by plaintiff to defendant was damages for seduction and pregnancy of defendant's daughter Lydia. It is ordered that the child, Mchabeni, be restored forthwith to its mother, Lydia, by plaintiff."

Plaintiff to pay costs.

For Appellant: Adv. L. R. Dison, instructed by Mr. T. Ntwasa.

For Respondent: Adv. N. Lochoff, instructed by Messrs. Helman & Michel.

ARBITRATION.

CASE No. 4 OF 1950 (POTCHEFSTROOM).

SARIEL MAPE *v.* DANIEL MOABI.

JOHANNESBURG: 23rd February, 1950. Before H. F. Marsberg, Esq., President, and Messrs. D. J. S. Visser and F. P. van Gass, Members of the Court (Central Division).

Agreement—Clause to submit disputes to arbitration—What is a dispute.

Claim: £175, balance of amount due to plaintiff, alternative relief and costs.

Plea: That in terms of the agreement the court has no jurisdiction to give judgment as the plaintiff and defendant have agreed *ante omnia* to submit disputes to arbitration. Defendant alleges several other grounds for opposition to plaintiff's claim.

Judgment: That there was a dispute, that such dispute should be submitted to arbitration as provided for in paragraph 11 of the written agreement of lease, that the summons was premature.

Summons dismissed with costs.

Appeal: That there was no dispute.

Held: That Native Commissioner's ruling was correct and the appeal is dismissed with costs. What is a dispute discussed.

Authorities: None.

Marsberg (President), delivering the judgment of the Court:—

In the Native Commissioner's Court at Potchefstroom, plaintiff, Sariel Mape sued defendant, Daniel Moabi, for payment of £175 and costs on allegations that *inter alia* on a certain written agreement of lease, dated 14th March, 1949, it was a condition that plaintiff could terminate the lease on giving one month's notice, whereupon defendant was to refund to plaintiff the amount still outstanding at that date, the amount being the balance of an amount of £190 in which defendant admitted being indebted to plaintiff. Defendant pleaded that in terms of the agreement the court had no jurisdiction to give judgment as the plaintiff and defendant had agreed *ante omnia* to submit the matter to arbitration. In his plea he alleged several other grounds for opposition to plaintiff's claim. For the purposes of this judgment it will suffice to refer only to paragraph 3 (*a*) of the plea which reads:—

> "Alternatively that the true construction of clause 5 (of the written agreement) is that the amount would be repaid by instalments of £2. 10s. in the absence of an accruing income from which the rent could be deducted."

The original written agreement of lease was handed into Court and without evidence being tendered by either side the Native Commissioner was requested to give a decision on the point at issue. After hearing the attorneys the Native Commissioner ruled that there appeared to be a dispute, that such dispute should be submitted to arbitration as provided for in paragraph 11 of the written agreement of lease and that the summons was premature.

Plaintiff has appealed against that ruling.

Before us argument has turned on the question whether there was a dispute between the parties which should go to arbitration. Whether or not there was a dispute had to be ascertained only

from the pleadings and the written agreement of lease. The main difficulty has arisen from the proposition: What is a dispute? Plaintiff has contended that the wording of section 5 of the lease is so clear that it is capable of only one construction, viz. that the amount owing and claimed by plaintiff was payable forthwith. As alleged in paragraph 3 (*a*) of his plea defendant contended that it was capable of another construction, the one urged by him.

Paragraph 11 of the agreement of lease provided—

> "The lessor and lessee hereby agree that should any dispute arise with regard to this lease or any of the provisions thereof, the dispute will be submitted to the Superintendent, Native Location, Potchefstroom, for arbitration and that his ruling will be final and binding on both parties."

Now, to revert, what is a dispute? A dictionary defines dispute to be: Controversy, debate, heated contention, quarrel, *difference of opinion.*

Stroud's Judical Dictionary.—A claim based on a non-agreement as well as one based on an actual conflict *ad idem* is a "dispute". A question of construction is a "difference" within the English Arbitration Act of 1889.

The issue the Native Commissioner had to decide was not which of the constructions placed by the contending parties was the correct one but whether there was a difference of opinion between them as to the meaning of the provision in the agreement of lease. It was not germane to the Native Commissioner's inquiry to determine whether the contention of one or other party was based on sound or perverse reasoning. All he had to determine was whether as a fact there was a difference of opinion between them. Both parties chose to interpret section 5 of the lease in different ways. They bound themselves by the terms of the lease to submit their differences of opinion, or their "disputes" to use the term employed, to arbitration.

That is the view taken by the Native Commissioner in his reasons for judgment. In paragraph 5 he says:—

> "The Court came to the conclusion that the possibilty of a dispute arising out of the provisions and interpretation of paragraph 5 read with paragraphs 2 and 3 of the agreement cannot be excluded and that on the pleadings there appears to be a dispute in regard to the lease, and that such dispute (or any dispute arising in regard to the lease or any of its provisions) is governed by the provisions of paragraph 11 of the agreement."

To be logical, the mere fact that two contending parties appeared before the Native Commissioner, and again before us, two conflicting arguments have been heard can indicate nothing more than that the parties do not see eye to eye. It is not our function, nor was it the Native Commissioner's to say to whom judgment should go, because the parties appointed the Superintendent of Native Locations to settle their differences. We agree that the Native Commissioner's ruling was correct.

The appeal is dismissed with costs.

Care should be exercised by judical officers holding dual office as Magistrate and Native Commissioner not to confuse their titles in proceedings in Courts of Native Commissioner.

For Appellant: Adv. J. Brodie, instructed by Mr. I. F. Waks, Potchefstroom.

For Respondent: Mr. P. J. Braun, instructed by Mr. J. P. Nel, Potchefstroom.

CHRISTIAN MARRIAGES: CLAIM FOR DOWRY.

CASE No. 5 OF 1950 (JOHANNESBURG).

JOHN LETABA *v.* **FRANK RALITHLALO.**

JOHANNESBURG: 24th February, 1950. Before H. F. Marsberg, Esq., President, and Messrs. D. J. S. Visser and F. P. van Gas, Members of the Court (Central Division).

Christian marriage—No agreement for dowry—Subsequent claim by father for payment of dowry "being the balance of the quantum *of dowry to* which father would be entitled *according to Bantu Law and Custom"—Such claim unknown in Native Law—Proviso to section* eleven (1) *of Act No.* 38 *of* 1947—"*Custom of lobola or bogadi* or other similar custom—*Meaning of—Law of defendant's residence to be applied—Basuto Custom considered.*

Claim: For £50, being the balance of the *quantum* of dowry to which plaintiff would be entitled according to Bantu Law and Custom.

Plea: Marriage contracted according to Law.

Judgment: Claim dismissed.

Appeal: That Native Law should be applied.

Held: Under Native Law no such action can be maintained—Appeal dismissed.

Authorities:

Section *eleven* (1), Act No. 38 of 1927.

Maxwell on Interpretation of Statutes.

Ex parte Minister of Native Affairs in *re* Yoko *v.* Beyi S.A.L.R., 1948, January (1).

Qashani Tonya *v.* Mpambo Matomane, N.A.C., 1949, S.D., Case No. 67, page 138.

Law No. 13, Basutoland Native Laws of Lerothodi.

Nthole *v.* Latoba, 1942, N.A.C. (C. & O.), page 125.

Marsberg (President), delivering the judgment of the Court:—

In the Native Commissioner's Court at Johannesburg, plaintiff, John Letaba, sued defendant, Frank Ralithlalo, for £50, "the said amount of £50 represents the balance of the *quantum* of lobola to which plaintiff would be entitled for his daughter, Betty Letaba, according to Bantu Law and Custom". The particulars of claim allege that:—

(*a*) In or about 1946 defendant seduced plaintiff's daughter, Betty, and as a result of the seduction a child was born. Defendant paid damages for the said seduction.

(*b*) In or about the month of August, 1948, defendant wrongfully and unlawfully and without the consent of plaintiff removed plaintiff's daughter, Betty, together with her child, to his home where he is cohabiting with her.

(*c*) As a result of the aforesaid wrongful and unlawful removal of plaintiff's daughter and her child plaintiff has suffered damages in the sum of £50 which defendant refuses or neglects to pay, despite demand.

It is common cause that on 5th October, 1948, defendant and Betty contracted a civil marriage before a marriage officer for coloured persons.

After trial of this matter plaintiff's claim was dismissed with costs. In his reasons for judgment the Native Commissioner appears to have decided the matter under the Common Law, holding that the intrusion of Native Law in the circumstances of this case would be *contra bonos mores*. This judgment has not been attacked on appeal that the Native Commissioner exercised his discretion as to the law to be applied improperly but one of the grounds of appeal is that the case should have been decided according to Native Law, as the cause of action is rooted in Native Law and Custom and that the judgment is in conflict with the provisos to section *eleven* (1) of Act No. 38 of 1927. Considerable argument was advanced by plaintiff before us in regard to the interpretation of section *eleven* (1) of Act No. 38 of 1927, the Native Administration Act.

Section *eleven* (1) reads as follows:—

> " Notwithstanding the provisions of any other law, it shall be in the discretion of the Courts of Native Commissioners in all suits or proceednigs between natives involving questions of customs followed by natives, to decide such questions according to the Native Law applying to such customs except in so far as it shall have been repealed or modified: Provided that such Native Law shall not be opposed to the principles of public policy or natural justice. provided further that it shall not be lawful for any Court to declare that the custom of lobola or bogadi *or other similar custom* is repugnant to such principles.

On the meaning of the underlined words " or other similar custom " plaintiff argued that the words meant *all* native custom and gave as examples, seduction and abduction. We are wholly unable to agree with plaintiff in this contention. Firstly, such an interpretation would be a violation of the *ejusdem generis* rule; secondly, if no Court can lawfully declare *any* native custom to be repugnant to the principles of public policy or natural justice, the first proviso would be wholly inoperative. The plain meaning of the words " or other similar custom " is restricted to the custom of lobola, bogadi or such *a* custom by whatever other name it is known by the different tribes practising lobola. In other words " or other similar custom " in the second proviso refers only to dowry or lobola. Any other meaning cannot be supported.

In the case of *ex parte* Minister of Native Affairs in *re* Yako *v.* Beyi, S.A. Law Reports, 1948, January (1), the rule in regard to the law to be applied in terms of section *eleven* of Act No. 38 of 1927, is clearly laid down. The discretion rests entirely with the Native Commissioner and parties have no right to claim that actions shall be determined by any system of law according to their own desires. No argument has been advanced before us that the Native Commissioner exercised his discretion improperly in this case. He had entire discretion to apply the common law—and the remarks of the Appellate Division in this respect should be noted—or Native Custom. The Native Commissioner applied the common law and we see no reason to hold that he erred in doing so.

The appeal before us was argued mainly in the light of Native Law. We propose to add a few remarks in this regard. Plaintiff claimed that the case should have been determined according to Basuto Law. Sub-section (2) of section *eleven* of Act No. 38 of 1927 prescribes the law to be applied. Had Native Law been applied in this case the system of law applicable at the place of defendant's residence would have been invoked, not that applicable to plaintiff.

Now, we must state emphatically that a claim in the form advanced by plaintiff, a claim for the payment of dowry to which he would be entitled, is one wholly unknown in native practice. This matter was reviewed in the case of Qashani Tonya *v.* Mpombo Matomane (N.A.C., 1949, Southern Division, Case No.

67, page 138). That was a case from a tribe practising the ukuteleka custom and was a claim for payment of the balance of dowry. The native assessors in that case stated unequivocally that according to native custom a guardian cannot maintain an action at law for the recovery of dowry payable for his ward, even if the balance of the dowry owing is admitted, but that he must invoke the custom of ukuteleka. The Court went on to state:—

> "In cases where the defendant had married his wife according to Christian rites and had agreed to pay a specific number of cattle, Courts have allowed the plaintiff to sue on the agreement, but this is so purely because the plaintiff is not permitted to teleka the wife. This may appear to be illogical but there is this to be said for it that the payment of dowry is not necessary for the validity of a civil or Christian marriage. The lobola contract is ancillary to the marriage contract and by entering into the marriage the only remedy open to the plaintiff is an action at law."

The opinion of the Native Assessors is apt:—

> *Question:* If the father brings an action in your Court, will your Court say "we will not listen to this case, you must teleka the girl?"
>
> *Answer:* We would drive him away. If he (defendant) should pay one beast the woman must be released from teleka.

The underlying idea is plain and sound.

Native Courts will not encourage fathers or guardians who come to demand their full pound of flesh. They are expected to consider the circumstances and well-being of their daughters and sons-in-law and have to be satisfied with payment of even one beast. And such is the underlying principle in regard to the payment of dowry as practised by all tribes. Such also is the practice where there has been agreement in regard to payment of dowry, but a claim for dowry to which a father would be entitled is not known.

A father would fare no better even under Basuto custom. To take a case on all fours with the one now before us. Under Law No. 13 of the Basutoland Native Laws of Lerothodi it is provided that: "If a young man seduce or abduct an unmarried woman *for the second time* he shall be obliged to marry her by payment of 'bohadi' *or in church* as the parents of the young persons shall agree." In effect that is what has transpired in this case.

Again, in the case of Nthole *v.* Latoba, 1942, N.A.C. (C. & O.), 125, the Native Assessor, Chief Jeremiah Moshesh, informed the Court:—

> "The act of twala does not in itself amount to a customary union, though often a preliminary step thereto. A fine of six head is imposed by the Bakwena for this form of abduction. This fine having been paid marriage negotiations may now be initiated. When an additional four head have been deposited on account of bogadi and the two family groups have agreed to a union between the young man and the girl, a beast is slaughtered to signify the completion of the marriage and acceptance of the bogadi which at this stage amounts to six cattle as the six head previously paid as a twala fine now merge in it.
>
> The bogadi fixed by Basuto custom consists of twenty head of cattle, ten goats, a horse and an mqoba beast. When *ten bogadi* cattle have been paid and the beast is killed, the girl is regarded as the wife of the young man. *The girl's father may claim the balance, but if ten head have been paid, we say the father of the young man has finished paying the head of the girl.*"

It should be quite clear from the foregoing remarks on Basuto custom that the primary objective is to ensure that the young man and the young woman enter into a marriage. Important as is the payment of dowry or bogadi it is not the main objective and so long as a reasonable amount be paid the marriage should proceed. Any harsh or unreasonable demands by the father are not encouraged in Native Courts. Among the native peoples lobola agreements are not hard commercial contracts. It is adm.tted in this case that defendant paid an amount of £30 to plaintiff, which in terms of the Court valuation of cattle in the Transvaal, i.e. £3 a head, is equivalent to 10 head of cattle.

The Native Commissioner has found as a fact that there was no lobola agreement at any stage. There was therefore no valid agreement on which plaintiff could sue. Plaintiff has, however, not sued on an agreement but has found his action on what he considered he would have been entitled to. As we have pointed out there is no legal remedy either as recognised by our Courts or founded in Native Law as practised by the Native Courts. The result in the end, as it was determined by the Native Commissioner or as it might have been before a Native Court is the same. Plaintiff's summons was rightly dismissed.

We have not been impressed by certain remarks made by plaintiff during the course of his argument and by the Native Commissioner in his reasons for judgment. Both have suggested that the issue in dispute raises matters of great moment to the native people which should be pursued to a higher tribunal. It is remarkable that though the issue was believed to be one of great importance, argument before us was entirely lacking in authoritative support. It should have been obvious that a question of this nature was no new one and that such a matter would have been before the Courts previously. As we have endeavoured to show the matter has long been settled, as a reading of the authorities would have indicated. There is no question of making legal history. The legislature has set up the Native Appeal Court as the final authority and Native Commissioners need not look further afield for guidance. The reports of the Native Appeal Court afford ample instruction over a period of many years on practically all the salient points of Native Law which have hitherto been submitted for adjudication.

The appeal is dismissed with costs.

For Appellant: Mr. H. Helman of Messrs. Helman & Michel, Johannesburg.

For Respondent: Mr. G. H. Behrman of Messrs. Behrman & Behrman, Johannesburg.

SEDUCTION AND PREGNANCY.

CASE No. 6 OF 1950 (JOHANNESBURG).

ENOCH THEFU *v.* AARON NOMINQO.

JOHANNESBURG: 24th February, 1950. Before H. F. Marsberg, Esq., President, and Messrs. D. J. S. Visser and F. P. van Gass, Members of the Court (Central Division).

Seduction and pregnancy—Second pregnancy—Gcaleka custom—Scale of damages.

Claim: £15 damages for seduction and pregnancy and costs.

Plea: Denial.

Judgment: For plaintiff for £15 and costs.

Appeal: Question of fact and contrary to native law.

Held: The amount of damages awarded was within the scale applicable to a case of this nature and the Court sees no reason to disturb the Native Commissioner's judgment. The appeal is dismised with costs.

Authorities:

Rex *v.* Olia, 1935, T.P.D.

Bekker *v.* Westenraad, 1942, T.P.D., 214, 221, 225.

Duigan *v.* Angehon & Piel, 1915, T.P.D., 82.

Andreassen *v.* Knowles, 1932, N.P.D., 27.

Njovune *v.* Ngamlano Pokana, 4, N.A.C., 321.

Sekoko Nake *v.* Bomvana Canti, 4, N.A.C., 333.

Whitfield's *South African Native Law*, pages 447, 448, 449, 450.

Marsberg (President), delivering judgment of the Court:—

In the Native Commissioner's Court at Johannesburg, plaintiff, Aaron Nominqo sued defendant, Enoch Thefu, for £15, being damages for seduction and pregnancy of his sister, Eunice Nominqo, alleged by plaintiff to have been caused by defendant during February, 1949. Defendant denied that he had ever been intimate with Eunice. Judgment having been given in favour of plaintiff as prayed, an appeal has been lodged by defendant that the judgment is against the evidence and the weight of evidence and on points of law that the amount awarded is contrary to Native Law.

On the facts of the case we are of opinion that the Native Commissioner was fully justified in finding that defendant did seduce and render Eunice pregnant.

On the amount of damages awarded we are, however, somewhat perturbed at the explanation offered by the Native Commissioner in his reasons for judgment. He has stated that he was in doubt as to what custom to apply because the parties live in Johannesburg and are Xosas. He suggests that a ruling from the Native Appeal Court would be of great assistance to the litigants.

There should have been no difficulty. Section *eleven* (2) of Act No. 38 of 1927 prescribes the law to be applied and reference to Whitfield's *South African Law*, pages 444-5, would have given sufficient information as to the native law applicable to cases of this nature. Native Law on the subject in Gcalekaland and Fingoland is the same. In the case of a second pregnancy of a "dikazi" the award of damages is a matter for the exercise of discretion on the part of the judicial officer and the award bears direct relation to the degree of care and control which the woman's father or gaurdian exercises over her.

On the record there is nothing to disclose that the guardian did not exercise care but on the other hand it does disclose that the seduction took place surrepticiously in the house of another person. For this conduct the plaintiff cannot be held responsible. The amount of damages awarded was within the scale applicable to a case of this nature and we see no reason to disturb the Native Commissioner's judgment.

The appeal is dismissed with costs.

For Appellant: Adv. L. R. Dison, instructed by Mr. T. J. J. Ntwasa.

For Respondent: Mr. H. Helman of Messrs. Helman & Michel.

KRAALHEAD RESPONSIBILITY.

CASE No. 7 OF 1950 (JOHANNESBURG).

JOSEPH ZINDELA *v.* **ELLIOT ZULU.**

JOHANNESBURG: 27th February, 1950. Before H. F. Marsberg, Esq., President, and Messrs. D. J. S. Visser and F. P. van Gass, Members of the Court (Central Division).

Seduction and pregnancy—Kraalhead only sued—Kraalhead liable only when wrongdoer jointly sued.

Claim: £15 damages for seduction and pregnancy and costs.

Plea: Irrelevant.

Judgment: For plaintiff in the sum of £15 and costs.

Appeal: Irrelevant.

Held: That plaintiff could have no cause of action against defendant as guardian and kraalhead alone. The appeal is allowed with costs and the Native Commissioner's judgment altered to read: Summons dismissed with costs.

Authorities:

Dhlamini *v.* Gatebe, 1944, N.A.C. (C. & O.), 69.

Section 141 (3), Natal Native Code.

Whitfield's *South African Native Law,* pages 268 and 295.

Marsberg (President), delivering judgment of the Court:—

In the Native Commissioner's Court at Johannesburg, plaintiff, Elliot Zulu, father and natural guardian of a girl, Alice, sued defendant, Joseph Zindela, father and natural gaurdian of his son, Kadala, for damages of £10 for seduction and pregnancy and £5 maintenance on allegations that the son, Kadala, seduced Alice, as a result of which she gave birth to a child on 22nd October, 1948. Plaintiff alleges that according to Native Law he is entitled to claim the damages from defendant, the guardian of the seducer.

The Native Commissioner gave judgment in favour of plaintiff. Defendant has appealed against the judgment.

It is not necessary to consider the proceedings because in our view the principles of Nativev Law have not been applied in this case.

Section 141 (3) of the Natal Code lays down:—

> "Legal proceedings arising out of any delict such as is referred to in sub-section (1) or in sub-section (2) may be instituted against the person committing the delict *or such person jointly with his father,* guardian or kraalhead as the case may be."

At page 295 Whitfield's *South African Native Law* states:—

> "Unless guardians are made parties to an action by being joined as co-defendants as well as merely assisting to give legal standing to their wards suing in their own right, they cannot be held responsible for non-compliance by their wards with orders made against the latter."

And at page 268:—

> "Native Law consequently holds the kraalhead liable only when the wrongdoer is directly sued as principle, the kraalhead being joined with him. If not so joined, the kraalhead cannot afterwards be made liable. And so it follows that he, the kraalhead, cannot be sued alone [Dhlamini *v.* Gatebe, 1944, N.A.C. (C. & O.), 69]."

The aforementioned quotations describe the Native Law generally in force throughout the Union. Following this statement of Native Law plaintiff in this case could have no cause of action against defendant alone, as guardian or kraalhead.

The appeal will be allowed with costs and the Native Commissioner's judgment altered to read: Summons dismissed with costs.

For Appellant: Adv. J. P. v. d. Walt, instructed by Mr. H. E. O. Screech, Johannesburg.

For Respondent: Not represented.

NOTICE OF APPLICATION: CUSTODY OF CHILDREN.

CASE No. 8 OF 1950 (BOKSBURG).

STANFORD CURRIE *v.* DEBORAH CURRIE.

JOHANNESBURG: 28th February, 1950. Before H. F. Marsberg, Esq., President, and Messrs. D. J. S. Visser and F. P. van Gass, Members of the Court (Central Division).

Notice of application to vary order of Court for custody of children— Jurisdiction—Process by way of informal application irregular—Fresh cause of action should be instituted by way of summons.

Claim: Application for variation of order of custody of two minor children.

Plea: Nil.

Judgment: That the Native Commissioner's Court has no jurisdiction to alter or vary the judgment delivered by the Native Commissioner on the 13th April, 1949.

Appeal: That the judgment is bad in law and that the Native Commissioner's Court has jurisdiction to vary an order granted by itself on good cause being shown to justify the variation of the said order.

Held: Appellant may present his claim for adjudication in due form by way of summons before a Court of competent jurisdiction. It is ordered that the proceedings before the Native Commissioner be set aside on grounds of irregular manner in which matter brought before the Court.

Authorities:

Maasdorp's Institutes, Volume 1, pages 123-125, 7th edition.

Section *ten* (3) of Act No. 38 of 1927.

Native Commissioner's Courts Rule No. 25.

Section 30 of Government Notice No. 2253 of 1928.

Marsberg (President), delivering the judgment of the Court:—

This is an appeal against a ruling given by the Native Commissioner at Boksburg on an application for an order to vary the order given in a previous case, No. 2, 1949, in which the plaintiff, Deborah Currie, claimed as against defendant, Stanford Currie, the custody of two minor children born of a marriage of the parties which was dissolved by the Native Divorce Court. In the case in question, No. 2, 1949, Stanford Currie was ordered to restore the children to Deborah within seven days. It was

ordered that the children remain with the mother, Deborah, until each reaches the age of seven years, the father, Stantord, to have reasonable access to the children at all times. This order was given on 13 April, 1949.

The present application was made by Stanford Currie notifying Deborah Currie that on 4th January, 1950, an order would be sought to vary the order made on 13th April, 1949. This application was addressed to the Clerk of the Court, Boksburg, and to Mrs. Deborah Currie, of Sophiatown, Johannesburg. It apparently was served by the Messenger of the Court but does not appear to have been issued by the Clerk of the Court. According to the Native Commissioner no case was on the roll at Boksbburg when he attended there on 4th January, 1950, on other business. The original of the applicatoin was not produced but as the parties were present the Native Commissioner, to avoid expense, heard the application on a copy which was not dated or signed or initialled by the parties or the Clerk of the Court, but ruled that he had no jurisdiction to vary the judgment given on 13th April, 1949.

In reasons for judgment the Native Commissioner states that he gave that ruling because none of the grounds on which a judgment may be rescinded or varied as prescribed in section 30 of Government Notice No. 2253 of 1928 were present (Native Commissioner's Court Rules). He was of opinion that the aggrieved party should have lodged an appeal to the Native Appeal Court, if not satisfied with the judgment given on 13th April, 1949.

This appeal is based on the grounds that this ruling is bad in law, in that the Native Commissioner at Boksburg did have the jurisdiction to vary the order for the custody of the children, on good cause being shown.

In this respect the appellant on general grounds is correct in his statement of the law. Orders for the custody of children are given on the circumstances existing at the time the order is made, but the Courts are always prepared at the instance of the parents of the children to consider further factors which may be placed before them to warrant the granting of a fresh order. The paramount test which influences the Courts is the welfare and interest of the *children,* not necessarily the interests of the parents. And any Native Commissioner could for good cause shown on further facts placed before him vary an order for custody of children given by another Native Commissioner or grant a fresh order. The request for variation is not an appeal against the original order, nor do the provisions of section 30 of the rules of Native Commissioner's Courts apply. To this extent the reasons given by the Native Commissioner cannot be supported.

We are doubtful, however, whether the form of procedure adopted in this case was the proper approach to the matter. In Native Commissioner's Courts Rule No. 25 lays down that the process of the Court for commencing an action shall be by way of summons which shall be signed and issued by the Clerk of the Court. Though framed in the form of a " Notice of Application " this application in its nature and substance embodies a fresh cause of action, necessitating the calling of evidence in its support. New factors not dealt with in the previous action would be the basis on which a Court would consider the matter. This would not involve necessarily reconsideration of evidence previously adduced. A wrong decision in a previous action could be corrected only by way of appeal to the appropriate Court, but that factor is not present in the case before us. In dealing with a claim of this nature a Native Commissioner would not be sitting in judgment on the order previously made but would be sitting in judgment on a claim based on a fresh set of circumstances. If, in the interests of the children, good cause were shown to him to make a fresh order or vary the original order,

he would be justified and is empowered to do so. The general practice of the Courts is outlined in Maasdorp's Institutes, Volume I, pages 123 to 125, seventh edition. A point taken before us by Mr. Jaffe who appears for respondent, a point which was not taken before the Native Commissioner, is that respondent is resident at Sophiatown, Johannesburg, outside the jurisdiction of the Native Commissioner at Boksburg. The proviso to section *ten* (3) of Act No. 38 of 1927 declares the jurisdiction of Courts of Native Commissioner in relation to persons. Had this point been well taken in the Court below it is possible that the Native Commissioner may have been able to give a ruling which would have supported the actual ruling given by him. Though he has erred in the reasons given by him for declining to accept jurisdiction, his ruling in itself appears to be correct. We do not think it necessary, however, to give a decision on this point. Though we have made it clear that a Native Commissioner has jurisdiction to hear a suit and make an order in a case of this nature we are not prepared to say that the Native Commissioner at Boksburg had jurisdiction to make an order on the particular application before him. We have held further that the form in which this matter was placed before him was irregular. The matter which the applicant desired to raise was of such a substantive nature that it could be dealt with properly only by way of trial, after issue of process in due form.

We have been constrained in this case to draw the attention of Mr. Helman who appeared for applicant to the fact that the process issued by applicant has not complied with the rules of the Native Commissioner's Court. "Process" is defined to mean a "notice", and according to rule II the Clerk of the Court shall sign all process of the Court. As we have pointed out the so-called "Notice of Application" in this case was in effect a claim of a substantive nature and it ought to have been signed by the Clerk of the Court.

It is clear from the record that the Native Commissioner was not happy at the course of these proceedings. In our opinion the only way in which we can rectify the matter is to set aside the proceedings. If he is so advised, the appellant, Stanford Currie, may present his claim for adjudication in due form by way of summons before a Court of competent jurisdiction.

It is ordered that the proceedings before the Native Commissioner be set aside. There will be no order as to costs.

For Appellant: Mr. Helman of Messrs. Helman & Michel, Johannesburg.

For Respondent: Mr. Jaffe of Messrs. Nathan & Jaffe, Johannesburg.

ADMINISTRATION OF ESTATES.

CASE No. 9 OF 1950 (GERMISTON).

JAMES MOFOKENG *v.* **ANTHONY SIBIYA.**

JOHANNESBURG: 7th June, 1950. Before H. F. Marsberg, Esq., President, and Messrs. P. H. Liefeldt and J. L. Pretorius, members of the Court (Central Division).

Scope of powers of Native Commissioner in administrative inquiry under Government Notice No. 1664 of 1929, as amended—Native Commissioner not entitled to declare anything other than heir to the estate—claims by third parties cannot be determined at inquiry.

Claim:

(1) Rebecca Modise, who claims to be the one and only heir to the entire estate property of the late Dora Sibiya.

(2) Antonie Sibiya, who claims to be the rightful owner and heir to the buildings on Stand No. 272, Germiston Location, which were included in the estate property.

(3) Norah Bantseki, who claims £12. 10s. out of the estate, being monies deposited with the lae Dora Sibiya.

Finding:

(1) Rebecca Modise succeeds to her late mother Dora's estate.

(2) That the late Dora never acquired ownership of the improvements situate on Stand No. 272, Germiston Location, which improvements will remain with Antonie Sibiya the lawful owner.

(3) Claim of Norah Bantseki allowed.

Appeal: By Rebecca Modise against Finding No. (2) above and that the Native Commissioner was not entitled to declare anything other than the heir to the estate and that claims relating to assets in the estate should have formed the issue in a judicial proceeding.

Held: That the Native Commissioner's finding goes beyond the scope of his powers in an inquiry into the administration and distribution of the property in an estate. It is ordered that the Native Commissioner's decision be amended to read: "Rebecca Modise, married in community of property to James Mofokeng, is declared to be the heir to the estate late Dora Sibiya."

Authorities:

Gideon Radebe as heir to estate Nobengula Radebe *v.* S. I. Nlabangane, 1940. N.A.C. (T. & N.), 38.

Government Notice No. 1664 of 1929, as amended.

Marsberg (President), delivering the judgment of the Court:—

This is an appeal against the findings of the Native Commissioner of Germiston in an inquiry under the provisions of Government Notice No. 1664 of 1929, as amended, in the estate of the late Dora Sibiya. Three parties appeared before the Native Commissioner.

1. Rebecca Modise, daughter of the deceased, and married to James Mofokeng in community of property on 2nd January, 1950, who claimed to be the sole heir.
2. Antonie Sibiya, illegitimate son of a woman, Sarah (who was the registered site holder of a certain Stand No. 272 in Germiston Location), and a man Amos. After Sarah's death, Amos married by Christian rites the deceased woman, Dora. In the course of time the Stand No. 272 was registered in the name of the late Dora Sibiya.
3. Norah Bantsheki, who claimed £12. 10s. from the estate.

After hearing evidence the Native Commissioner found as follows:—

(1) An amount of £12. 10s. out of the liquid assets in the estate of the late Dora Sibiya is to be paid to Norah Bantsheki.

(2) The balance of the estate, excluding the buildings on Stand No. 272, Germiston Location, devolves upon Rebecca Modise, the daughter of the late Dora.

(3) The estate property consisting of the buildings on Stand No. 272, 4th Street, Germiston, devolves upon Antonie Sibiya, in his capacity as heir to his late mother, Sarah, to whom these buildings originally belonged and which were not legally owned or acquired by the late Dora Sibiya.

The appeal is lodged by Rebecca Modise against that part of the findings dealing with the improvements situated on Stand No. 272 on the grounds that the inquiry was irregular, that the Native Commissioner was not entitled in an administrative inquiry to declare anything other than the heir to the estate and that claims relating to assets in the estate should have formed the issue in a judicial proceeding.

In an addendum to his reasons for judgment the Native Commissioner very fairly concedes that his findings go beyond the scope of his powers in an inquiry into the administration and distribution of the property in an estate. In such an inquiry he could not give directions on the claims of third persons against the estate [Gideon Radebe as heir to estate Nobengula Radebe *v.* S. I. Nlabangane, 1940, N.A.C. (T. & N.), 38]. This case is authority in favour of appellant's contention.

It does not necessarily follow that claims by third persons *must* form issues in judicial proceedings. The validity of such may be apparent or admitted and payment may be effected without recourse to judicial proceedings. The record discloses that the claims of the parties in this inquiry were substantially investigated and it may be that the validity of the various claims has been established. Without prejudice, however, to the rights of the parties this should be borne in mind in the further liquidation of the estate.

We must allow the appeal in regard to the findings of the Native Commissioner and order that his decision be amended to read:—

> "Rebecca Modise, married in community of property to James Mofokeng, is declared to be the heir to the estate late Dora Sibiya."

In limine an application for late noting of appeal was made which we granted.

For Appellant: Mr. H. Helman of Messrs. Helman & Michel, Johannesburg.

For Respondent: Mr. S. Wade, Germiston.

NATIVE CUSTOMARY UNION: STATUS OF WOMAN.

CASE NO. 10 OF 1950 (VERELNIGING).

MOTSEKI PAHLOMETSANG *v.* **STEFAANS MATSANENG.**

JOHANNESBURG: 8th June, 1950. Before H. F. Marsberg, Esq., President, and Messrs. P. H. Liefeldt and J. L. Pretorius, Members of the Court (Central Division).

Native customary union—Desertion of wife—Action against father for her return—Wife no locus standi *to intervene in action as a party.*

Claim: Application by deserting wife to set aside judgment in action between her husband and her father.

Plea: None.

Judgment: Application allowed and judgment varied.

Appeal: That applicant had no *locus standi* to intervene.

Held: Grounds of appeal upheld and Native Commissioner's judgment set aside. Original judgment to stand.

Authorities:

Sibiya *v.* Mbata, 1942, N.A.C. (N. & T.), page 47.

Section *eleven* (3) (*b*) of Act No. 38 of 1927.

George Mashapo *v.* Joel Sisane, 1945, N.A.C. (T. & N.), page 58.

Bobotyane *v.* Jack, 1944, N.A.C. (C. & O.), page 9.

Mackenzie Mothombeni *v.* John Matlou, 1945, N.A.C. (T. & N), page 128.

Section 29 (5) under Government Notice No. 2253 of 1928.

Marsberg (President), delivering the judgment of the Court:—

On the 28th October, 1948, the Native Commissioner at Vereeniging gave judgment in the action between Stefaans Matsaneng, plaintiff, and Motseki Pahlametseng, defendant, in which plaintiff claimed form defendant the return of his wife, Paulina, daughter of defendant, failing which refund of lobola paid, custody of three minor children and return of certain blankets or payment of their value. At the trial defendant was not present but was represented by his attorney. Judgment was given in favour of plaintiff, Stefaans Matsaneng.

On the 24th June, 1949, application was filed by defendant for an order to set aside judgment against him on the grounds that it was obtained by fraud and perjured evidence. On the 27th July, 1949, the Native Commissioner heard the application but refused to set the judgment aside. There is no appeal against this decision and the matter is not before us.

Simultaneously, however, with the application of defendant a further application was made by Paulina Matsaneng, dated 24th June, 1949, in terms of rule 30, sub-rule (5) of the Native Commissioner's Court Rules, for an order setting aside the judgment granted against her on 28th October, 1948. Paulina's application also claimed the setting aside as null and void of the warrant of execution issued to give effect to the judgment delivered on 28th October, 1948. Her application is stated to be supported by her father, the defendant. The purport of the affidavits supporting Paulina's application is that she has been seriously prejudiced by the judgment given against her father, the defendant, in that her married status and her status in relation to her children are affected. Further, that she had no opportunity of appearing in Court in person or as a witness in the proceedings.

The Native Commissioner proceeded to hear the application of Paulina. In his reasons for judgment he states:—

> "Paulina was not a party to the original action on 28th October, 1948, but the application in her case was made in terms of section 29 (5) of the Regulations for Native Commissioner's Courts, published under Government Notice No. 2253 of 1928, she being a person affected by such judgment."

After hearing the parties the Native Commissioner gave judgment for applicant (Paulina) rescinding that part of the order made by the Court on 28th October, 1948, awarding custody of the minor children to plaintiff. The Native Commissioner gives the interests of the children as his reason for making this order. He also set aside the warrant of execution as invalid.

It is of prime importance in this matter to bear in mind that the original action was one based solely on Native Law. In actions of this nature where a wife deserts her husband to whom she is married by Native Custom the husband sues the father for the return of his wife, failing which the return of his dowry. The wife is not a party to the action. It is the father's duty and sole concern to return the wife or refund the dowry. On this point the case of Sibiya *v.* Mbata [1942, N.A.C. (N. & T.), Case No. 47] was mentioned. Though the obiter remarks

of the President in that case refer to the interests of the wife, having in mind no doubt the practice in Natal, that case is no authority to suggest that the wife is an interested party in the proceedings. It is not in accord with practice and Native custom in the Transvaal. A Native woman married by Native Custom has no legal status—see section *eleven* (3) (*b*) of Act No. 38 of 1927—and when, as in this case, she ceases to be married to her husband she reverts to the guardianship of her father. She and her children (if the latter are repudiated or disowned by their father) are regarded as children of her own father. This is basic Native Law. The rights in the children are determined by the deductions made on the return of the dowry.

In view of the weight of authority apparently against the appellant, we, of our own motion *in limine* directed that argument should be advanced to us on the question of applicant, Paulina's status and right to intervene in the proceedings. Counsel for Paulina thereupon strenuously argued that she was being "divorced" from her children and she should as a right be given a hearing in Court to state her case. As against the weight of many decided cases to the effect that a woman married by Native Custom has no legal status to appear in Court, Counsel argued that such right should be afforded her on the grounds that to hold otherwise would be contrary to good morals and public policy. We were virtually urged to override previous decisions of the Native Appeal Court. From time immemorial, however, a woman under Native Custom has been regarded solely as a child bearer and has no say over the custody of the children. Furthermore, a woman has never been permitted to intervene as a party to an action. The Native Appeal Court has recognised this disability of woman under Native Law, and there are many decisions to that effect. We see no good reason to depart from established practice nor to hold that it would be contrary to public policy to deny Paulina the right to intervene in this matter. The danger of introducing such innovations into the practice of Native Law was commented on in the case of George Mashapo and Myeti Mashapo *v.* Joel Sisane [1945, N.A.C. (T. & N.), at page 58] with which remarks we see no reason to differ.

Now, it does appear that Mr. Wiid, for plaintiff, did contest the right of Paulina to appear as a party in the proceedings. Whether he did not press his argument strenuously enough or fortify his argument by authorities, of which there are ample, the record is silent and the Native Commissioner does not appear to have given thought to the matter, but in our view the *locus standi in judicio* of Paulina should have been thoroughly canvassed. As we have indicated, in Native Law a Native woman has no judicial status.

The legal relationship of the parties married by Native Custom was considered in the case of Bobotyane v. Jack [1944, N.A.C. (C. & O.), 9]. From that case it will be seen that a husband can repudiate a wife, even against the latter's wishes. Though her "married status" may be materially affected she has no legal remedy to aid her against her husband's repudiation. In the case before us Paulina's contention that her marital status was vitally affected cannot found any legal action or remedy whereby she could resist her husband's action against her father. This kind of issue usually resolves itself into a question of the disposal of the lobola. In a case of this nature the woman's interests are generally protected indirectly by her father. In most cases she appears as a witness but not as one of the parties.

Guidance on the question of the custody of the children may be sought in the case of MacKenzie Mothombeni *v.* John Matlou [Case No. 60, 1945, N.A.C. (T. & N.), at page 128].

We are of opinion that Paulina, the applicant, had no legal standing to intervene in this matter and her application should not have been entertained. Consequently the Native Commissioner should not have varied the judgment delivered on 28th October, 1948.

The appeal is dismissed.

It is ordered that the judgment delivered on 28th October, 1948, shall stand as the judgment of the Court of Native Commissioner.

There will be no order as to costs.

For Appellant: Mr. H. Helman of Messrs. Helman & Michel, Johannesburg.

For Respondent: Mr. F. G. J. Wiid of Messrs. Vorster, Carter & Steyn, Vereeniging.

COSTS *DE BONIS PROPIIS* AGAINST ATTORNEY.

CASE No. 11 OF 1950 (JOHANNESBURG).

DICK KUZWAYO *v.* LAWRENCE GULE.

JOHANNESBURG: 8th June, 1950. Before H. F. Marsberg, Esq., President, and Messrs. P. H. Liefeldt and J. L. Pretorius, Members of the Court (Central Division).

Order against attorney of record to pay costs de bonis propiis *for undue delays.*

Judgment: Dr. P. Ka I. Seme to pay wasted costs of the proceedings on 5th January, 1950 and 17th January, 1950, *de bonis propiis.*

Held: The Native Commissioner saw fit to hold Dr. Seme personally responsible for the undue delays in the case and the Appeal Court considers that he was justified in doing so. The appeal is dismissed with costs against Dr. Seme, *de bonis propiis.*

Authorities:

Section 28 of Government Notice No. 2253 of 1928.

Marsberg (President), delivering the judgment of the Court:—

This is an appeal by Dr. P. Ka I. Seme, attorney of record for defendant in Johannesburg Native Commissioner's Court, Case No. 1015/48, against a decision ordering Dr. Seme to pay wasted costs *de bonis propiis* on two days of the proceedings.

The grounds of appeal are as follows:—

(*a*) The order was bad in law in that no notice was given to the appellant as required by law that application would be made for him to pay the costs *de bonis propiis.*

(*b*) The order was bad in law in that no dishonourable or disgraceful conduct could be imputed to the appellant.

(*c*) The order was bad in law in that the case was not a fitting one for an order of costs *de bonis propiis* to be made.

(*d*) The order was bad in law in that the evidence showed there had been a misunderstanding between the attorneys, the blame for which should not have been attributed to the appellant.

(*e*) The order was against the evidence and the weight of evidence.

Section 28 of Government Notice No. 2253 of 1928—Regulations for Courts of Native Commissioner in civil prodeedings—prescribes as follows:—

"The Court may in any action—

(*d*) make such order as to costs as may be just."

The test is that the order must be just. It is not circumscribed by formality.

In his reasons for making this order on costs the Native Commissioner after reviewing the events in this matter states: "It is the opinion of this Court that Dr. Seme's failure to take these elementary precautions constituted an indifference to the procedure of the Court and an act of negligence against the interests of plaintiff and defendant. No blame whatever can be attached to the defendant personally for having been in default at the hearing at 9.30 a.m. on the 5th January, 1950, when the plaintiff was again frustrated in having the protracted proceedings concluded. The Court therefore felt that Dr Seme should be ordered to pay the wasted costs of the proceedings on 5th January, 1950, and 17th January, 1950, *de bonis propiis*."

We have perused the Native Commissioner's notes on the record and the statements in the affidavits and we also come to the conclusion that Dr. Seme's conduct in the course of these proceedings is not in keeping with his duty as an officer of the Court. He allowed himself to be involved in other activities which caused several defaults in the case before the Native Commissioner. The Native Commissioner was under no obligation to deal with the case otherwise than in open Court, but the record discloses that he gave considerable consideration to negotiations between the parties out of Court. The Native Commissioner was concerned, however, only with proceedings before him in Court. It seems needless to emphasise that it is the duty of parties and their representatives to attend Court at the fixed hour. Courts cannot await the convenience of parties.

The Native Commissioner saw fit to hold Dr. Seme personally responsible for the undue delays in the case. We consider that he was justified in doing so. We can see nothing unjust in his order as to costs. Moreover, as the award of costs is a matter largely in the discretion of the Court, a very strong case would need to be made out to justify an Appeal Court to interfere with the decisions of a judicial officer. We have not been so pursuaded.

The appeal is dismissed with costs against Dr. Seme *de bonis propiis*.

For Appellant: Dr. P. Ka I. Seme, Johannesburg.

For Respondent: Mr. H. Helman of Messrs. Helman & Michel, Johannesburg.

CUSTODY OF CHILDREN.

CASE No. 12 OF 1950 (VEREENIGING).

STANLEY KAMBU v. VIRGINIA KAMBU.

JOHANNESBURG: 9th June, 1950. Before H. F. Marsberg, Esq., President, and Messrs. P. H. Liefeldt and J. L. Pretorius, Members of the Court (Central Division).

Custody of children—Principles which guide the Courts.

Claim: Custody of child.

Plea: Immaterial.

Judgment: Child placed in custody of mother.

Appeal: On fact.

Held: Native Commissioner exercised his discretion correctly.

Appeal dismissed.

Authorities: None.

Marsberg (President), delivering the judgment of the Court:—

This is an appeal against the judgment of the Native Commissioner at Vereeniging refusing to rescind a default judgment given against defendant, Stanley Kambu at the instance of his divorced wife, plaintiff, Virginia Kambu, in Vereeniging Native Commissioner's Case No. 42 of 1949. In the affidavit supporting the application for rescission defendant alleged that on the day of the trial he was ill and unable to attend Court. Furthermore he alleged that he had a good defence and had been prejudiced by the default judgment entered against him. The substance of the case between the parties was the custody of a boy, 4 years of age, born of their marriage. By agreement between the parties at the time of the divorce the custody of the child was left with the father, Stanley. As a result of the default judgment the child was ordered to be and was placed in the custody of the mother, Virginia.

The Native Commissioner who refused to rescind the default judgment has given convincing reasons in a well prepared judgment and no argument has been advanced before us why we should differ from him.

In cases of this nature—the custody of children—the responsibility for watching the welfare of the child is vested mainly in the Courts and judicial officers have a very wide discretion. In exercising that discretion the judicial officer is guided largely by the interests of the child and not so much by the feelings of the parents. As a general rule the father is entitled to the custody of children, but in the case of those under the age of seven years the Courts, realising that for natural reasons the mother is better fitted to care for very young children, order that the mother shall have custody unless for very special or sound reasons they should order otherwise. If circumstances materially alter at any time parents are always at liberty to approach the Courts for a variation of orders made for the custody of children. But it must be emphasised that when these matters form the subject of judicial proceedings the custody is awarded in the interests of the children within the discretion of the judicial officer.

In this case there is nothing on the record to indicate that either in the main case or the application for rescission the Native Commissioners have not wisely exercised their discretion.

We are therefore unable to interfere.

The appeal is dismissed with costs.

For Appellant: Mr. A. Hattenbach of Vereeniging.

For Respondent: Mr. H. Helman of Messrs. Helman & Michel.

AGREEMENT : PARTNERSHIP.

CASE No. 13 OF 1950 (VEREENIGING).

ISAAC MOFIKO *v.* **MOSES MORALE.**

JOHANNESBURG: 9th June, 1950. Before H. F. Marsberg, Esq., President, and Messrs. P. H. Liefeldt and J. L. Pretorius, Members of the Court (Central Division).

Alleged partnership agreement—Claims share in profits and repayments of funds invested in partnership—Onus of proof of partnership agreement on plaintiff not discharged.

Claim: Plaintiff sued defendant for payment of the sum of £194. 8s. 9d., representing two amounts of £101. 18s. 9d. and £92. 10s., being respectively plaintiff's share in profits and repayment of funds invested in the purchase of a motor car, in connection with a partnership entered into between the parties on an agreement made about May, 1947.

Plea: Defendant admits that he agreed to enter into a partnership, provided that plaintiff would pay an amount of £92. 10s., that plaintiff paid £65. 10s. and was given a year to find the balance. That subsequently he was unwilling to wait and refunded this amount.

Defendant denies generally all other allegations.

Judgment: Ten gunste van verweerder met koste insluitende koste van 11 Augustus 1949.

Appeal: On questions of fact.

Held: As Native Commissioner's judgment was largely influenced by inadmissible evidence appeal is allowed.

Authorities:

Benefits Cycle Works *v.* Atmore, 1927, T.P.D., 524.

Marsberg (President), delivering the judgment of the Court:—

In the Native Commissioner's Court at Vereeniging plaintiff, Isaac Mofiko, sued defendant, Moses Morale, for payment of the sum of £194. 8s. 9d., representing two amounts of £101. 18s. 9d. and £92. 10s., being respectively plaintiff's share in profits and repayment of funds invested in the purchase of a motor car, T.V. 826, in connection with a partnership entered into between the parties on an agreement made about May, 1947.

The final judgment, after amendment in terms of an abandonment of portion of the judgment given by the Native Commissioner now reads:—

> "Ten gunste van verweerder met koste insluitende koste van 10 Augustus 1949."

The Native Commissioner found that no partnership agreement had been entered into.

Plaintiff has now appealed on various grounds, amongst others that the judgment is against the evidence and the weight of evidence.

Two documents admitted into evidence, exhibits C and D have been challenged on the grounds that they were not properly stamped in accordance with law. As this is in fact the position in regard to those documents they must be excluded from consideration.

Viewing the evidence for plaintiff at its highest value we find he alleges that he and defendant appeared before a European, Honeycomb, who prepared a written agreement of partnership;

that he (plaintiff) paid defendant two amounts of £65. 10s. and £27 to make up his contribution of £92. 10s. towards the purchase of the car; that a car was purchased from Chattertons for £185; that profits were earned to the extent of £203. 17s. 6d.; that the partners lived together for a short while after which plaintiff was driven out. Honeycomb gave evidence to the effect that two natives whom he could not identify in any way had appeared before him and he had drawn up a written agreement. Plaintiff alleged that he had lost his copy of the document.

Plaintiff's mother, Anna Mofiko, gave evidence that the car was brought to her for inspection and stated that the parties had informed her of the partnership agreement. At no stage was the alleged written agreement of partnership produced before the Court and secondary evidence of the terms of the agreement was not admitted.

Defendant for his part admitted that he had agreed to enter into a partnership, provided that plaintiff would pay in an amount of £92. 10s.; that plaintiff had paid £65. 10s. and was given a year to find the balance; that subsequently he (defendant) was unwilling to wait and refunded this amount to plaintiff. Defendant denied that plaintiff had paid the sum of £27 as alleged. Defendant bought the motor car for £185 and produced a sales receipt in his name. Defendant generally denied all the other allegations of plaintiff and his witnesses.

The evidence rests entirely on the verbal statements of the witnesses. The documentary evidence was either not produced or has had to be excluded from consideration. As the onus of proof in regard to the partnership agreement rested on plaintiff—and the best proof would have been the production of the alleged written agreement—he could not on the evidence before the Court have secured judgment in his favour. At most there could have been absolution.

In arriving at his decision the Native Commissioner has stated in his reasons for judgment that "the case eventually boiled down to the consideration of documents C and D that speak for itself and on the strength of which the Court had no alternative but to give judgment in favour of the defendant for the amount of £6. 17s. 2d." From this reasoning it is obvious that the Native Commissioner's mind was very materially influenced by the evidential value which he attached to the two documents in question. As we have pointed out these documents, through not being properly stamped as required by law, were inadmissible as evidence. We are unable therefore to hold that the Native Commissioner has not erred in arriving at his decision. On the admissible evidence before us we are of opinion that the correct judgment should have been one of absolution from the instance.

The appeal is accordingly allowed with costs and the Native Commissioner's judgment altered to read—

> "Absolusie van die instansie met koste insluitende koste van 11 Augustus 1949."

For Appellant: Adv. G. A. Coetzee, instructed by Messrs. Smit & Malan, Vereeniging.

For Respondent: Mr. H. J. Grevelinck of Messrs. Vorster, Carter & Steyn, Vereeniging.

GUARDIANSHIP: NATIVE CUSTOM.

CASE No. 14 OF 1950 (VENTERSDORP).

SAUL MALAKUTU *v.* JONAS MALAKUTU.

JOHANNESBURG: 10th June, 1950. Before H. F. Marsberg, Esq., President, and Messrs. P. H. Liefeldt and J. L. Pretorius, Members of the Court (Central Division):—

Legal standing to bring action—Guardianship flows only through male line—party cannot acquire legal rights of guardianship in respect of his married sister's child.

Claim: Four head of cattle or their value, £20, for seduction and pregnancy.

Plea: That plaintiff is a guardian in the proper sense.

Judgment: For plaintiff as prayed with costs.

Appeal: That plaintiff is not the guardian of Alina Molamu.

Held: Only girl's father or paternal uncle or brother could have legal standing to bring an action in which she is concerned. Consequently plaintiff is entirely out of Court and the Native Commissioner's judgment is altered to read: "Summons dismissed with costs."

Authorities:

Mrubata *v.* Dundolo, 1949, P.H. 2, R. 42.
Alinah Lehasa *v.* Reuben Gewane, 1947, N.A.C. (T. & N.), page 132.

Marsberg (President), delivering the judgment of the Court:—

In the Native Commissioner's Court at Ventersdorp, plaintiff, Jonas Malakutu, sued defendant, Saul Malakutu, for payment of four head of cattle or their value, £20, as damages in the loss of marriage value for defendant's seduction and pregnancy of plaintiff's ward, Alina Nolamu.

Defendant denied that plaintiff was the guardian in the proper sense.

It appears that Alina is the daughter of plaintiff's sister. Alina's father has been away since she was a small child. Alina has a brother.

The only reason given by plaintiff for bringing the action was that he brought Alina up. Now, unfortunately, plaintiff could acquire no legal rights of guardianship in respect of his married sister's child merely by reasons of his succouring her family. Guardianship flows only through the male line. Only Alina's father or paternal uncle or brother could have legal standing to bring an action in which she is concerned. Consequently plaintiff is entirely out of Court.

It is unnecessary to consider the merits of the case because plaintiff cannot maintain the action.

The appeal is allowed with costs and the Native Commissioner's judgment is altered to read "Summons dismissed with costs."

Care should be exercised by Magistrates who are also Native Commissioners not to confuse their titles in proceedings in Native Commissioner's Courts.

For Appellant: Adv. R. Saffery, instructed by Messrs. Nel & Louw, Potchefstroom.

For Respondent: Mr. J. Fein, instructed by Mr. F. G. Gillett, Ventersdorp.

TRIBALLY-OWNED FARM: OWNERSHIP, OCCUPATION OR ACQUISITION.

CASE No. 15 OF 1950 (PILANSBERG).

MOKGATLA MABE *v.* COMFORT DIOLE.

JOHANNESBURG: 13th June, 1950. Before H. F. Marsberg, Esq., President, and Messrs. P. H. Liefeldt and J. L. Pretorius, members of the Court (Central Division).

Claim for damages—Rights of occupation, section four, *Native Administration Act, No.* 38 *of* 1927—*Whether applicable to claim against chief for damages for trespass and interference with a resident's rights—Scheduled Native area within the provisions of Act No.* 27 *of* 1913—*Institution of proceedings.*

Claim: Damages in the amount of £200 which resulted from defendant's refusal to grant permission to plaintiff to sink a borehole.

Plea: That in terms of section *four* of Act No. 38 of 1927 plaintiff is required to comply with the prerequisite of handing in a written certificate issued by the Secretary for Native Affairs, stating that the Governor-General has approved of these proceedings.

Judgment: Objection upheld.

Appeal: That the judgment is bad in law in that the legal proceedings were not in regard to ownership, occupation or acquisition of land by a native tribe and that section *four* of Act No. 38 of 1927 is therefore no bar against the institution of proceedings.

Held: That section *four* of Act No. 38 of 1927 must be construed strictly. The scope is intended to matters relating to the ownership, occupation or acquisition of land by a Native tribe. To give an extensive interpretation to these words, to include ancilliary or remotely connected disputes would lead to absurdity.

Appeal allowed.

Authorities: De Wet *v.* Deetlefs, 1928, A.D., 286.

Marsberg (President), delivering the judgment of the Court:—

This appeal was struck off the rolls in the February, 1950, session of this Court because no valid Notice of Appeal was before us. We have now been petitioned to condone the late noting of the appeal. We have decided to do so because from the record clearly there was misunderstanding between appellant and the Clerk of the Court and an important point of law appears to be involved.

The point of law relates to the effect which section *four* of the Native Administration Act, No. 38 of 1927, may have, upon litigation.

The section reads as follows:—

> " No legal proceedings in regard to the ownership, occupation or acquisition of land by a native tribe shall be instituted or maintained against the Chief of such tribe or against such tribe, or both, by an individual member or members of the tribe concerned unless such member or members produce a written certificate issued by the Secretary for Native Affairs, stating that the Governor-General has approved of the institution of such proceedings."

When plaintiff, Comfort Diole, sued defendant, Mokgatle Mabe, in his capacity as Acting Chief of the Bathlako Tribe at Mabies Kraal, Rustenburg District, for £200 as damages and/or *injuria* suffered by plaintiff through the wrongful, malicious and unlawful acts, negligence and/or dereliction of duty as Chief and/or for trespass and wrongful interference with the rights of plaintiff, thereby causing plaintiff to suffer pecuniary loss and damages, defendant raised the defence that plaintiff could not institute proceedings without the certificate required in terms of section *four* quoted above. The Native Commissioner upheld the defence with costs.

Plaintiff has appealed against this ruling on the ground that the proceedings in question did not relate to ownership, occupation or acquisition of land by a native tribe and that therefore the prohibition under section *four* of the Act was inapplicable.

Now, the substance of plaintiff's claim is that defendant prevented him from sinking a borehole on the property plaintiff occupied at Mabies Kraal as a result of which plaintiff has suffered pecuniary loss and damage to the extent of £200. Mabies Kraal is scheduled native area within the provisions of the Schedule to the Natives Land Act, No. 27 of 1913. This area appears to be occupied by the Bathlako tribe under Acting Chief Makgatle Mabe. Plaintiff's claim is one for damages and he has argued that such a claim does not fall within the purview of section *four* which, he submitted, refers only to matters of ownership, occupation and acquisition of land. He argued that this section, being an encroachment upon a subject's right of approach to the Courts, must be interpreted strictly and narrowly. He quoted as his authorities the cases of de Wet *v.* Deetlefs, 1928, A.D., 286, and Calitz v. Lyle, 1928, C.P.D., 544.

Defendant argued the point of view that section *four* must have a very wide interpretation. He quoted Magano *v.* Mathope, N.O., 1936, A.D., 502.

Following ordinary rules of interpretation and the line of approach in Deetlefs' case, we are of opinion that section *four* of Act No. 38 of 1927 must be construed strictly. Its scope is therefore limited to matters relating to ownership, occupation or acquisition of land by a native tribe. To give an extensive interpretation to these words, to include ancilliary or remotely connected disputes, would lead to absurdity. For instance plaintiff has claimed, *inter alia,* £30. 10s. damages as representing loss in health and enjoyment of water by members of the household including chickens, ducks, etc. (that is to say in respect of water which he might have obtained had the borehole been successfully sunk). Now, we hardly think that the legislature intended that the Secretary for Native Affairs should approach the Governor-General to obtain his approval for the institution of legal proceedings by plaintiff against his Chief on such a claim. Had the legislature intended the section to be wide in its application, it would have said so in express terms. In the absence of definition of the words used they must be given their ordinary plain meaning. Where the legislature intends an extentive interpretation of an expression it usually states so expressly. As an example see section *five* (1) of Act No. 25 of 1945, Natives (Urban Areas) Consolidation Act, in regard to the meaning of " acquisition ".

Reading the pleadings as they stand (in this case the summons) we find a claim for damages which does not bring into issue any question of ownership, or occupation of land. Such a claim does not require the special approval of the Governor-General. The Court must determine whether the issues fall squarely within the ambit of the section or whether incidental thereto. If the issue is not a matter of ownership, occupation or acquisition, strictly interpreted, then there is no limitation on the Court's jurisdiction.

In the case before us we are of opinion that the Native Commissioner erred in upholding the objection.

The appeal is allowed with costs, except respondent's costs in respect of the application for condonation of the late noting of appeal, which must be borne by applicant.

For Appellant: Adv. Dison, instructed by Dr. P. Ka I. Seme, Johannesburg.

For Respondent: Adv. G. P. C. Kotze, instructed by Messrs. Kotze & Duffey, Rustenburg.

RES JUDICATA.

CASE No. 16 OF 1950 (GERMISTON).

JOHN METSING *v.* WALTER NGOYI.

JOHANNESBURG: 13th June, 1950. Before H. F. Marsberg, Esq., President, and Messrs. P. H. Liefeldt and J. L. Pretorius, Members of the Court (Central Division).

Plea of res judicata—*Purpose of—To obviate vexatious litigation —Whether a defendant is being vexed again for the same action —Depends not upon technical considerations but upon matters of substance.*

Claim: For moneys due under sale in execution.

Plea: Res judicata.

Judgment: Plea upheld.

Appeal: Judgment is bad in law in that the said action is not *res judicata.*

Held: That both in the first action when the plaintiff claimed the moneys *due to him* and in the second action when he claimed the share *payable to him* he was endeavouring to obtain the money payable under the writ of execution, that the plea of *res judicata* had rightly been upheld and that therefore the appeal be dismissed.

Authorities: None.

Marsberg (President), delivering the judgment of the Court:—

On the 16th May, 1949, plaintiff obtained judgment by default against defendant, Walter Ngoyi, the Messenger of the Court, in an action in which he prayed for an order against the defendant ordering him to account to the plaintiff for the proceeds of the sale of a certain property sold in execution and for an order compelling the defendant to pay to the plaintiff the moneys due by defendant to plaintiff under the sale in execution.

Some months later plaintiff, John Metsing, again sued defendant, Walter Ngoyi, in the Native Commissioner's Court at Germiston in an action in which he prayed for judgment against defendant in the sum of £52. 10s. 11d., being the proportionate share payable to him from the writ of execution as aforesaid.

To this second claim the defendant pleaded that the matter was *res judicata* and when the case came before the Native Commissioner on 16th March, 1950, defendant's plea in bar was upheld and the summons dismissed with costs.

Plaintiff has appealed against this judgment on the ground that it is bad in law in that the said action is not *res judicata* and the Native Commissioner erred in coming to such conclusion.

Stated in that form the notice of appeal is not a compliance with the decisions of the Courts. It does not state in which way the judgment is bad in law or in what way the Native Commissioner erred.

Argument before us centred round the proposition whether or not the three requisites to support the plea of *res judicata* were present. It was conceded that the same parties were involved and that the same point was in issue, but plaintiff argued that the same thing was not demanded in the second action as in the first and that therefore the matter was not *res judicata.*

In the first action we have seen that plaintiff demanded payment of the moneys *due to him.* He obtained judgment to that effect.

In the second action he demands £52. 10s. 11d., being the share *payable to him.*

In both instances the plaintiff is endeavouring to obtain money due to him, the money payable under the writ of execution. He duly brought action against defendant to compel payment and obtained judgment.

The purpose of a defence of *res judicata* is to obviate vexatious litigation and the question whether a defendant is being vexed again for the same cause of action depends, not upon technical considerations, but upon matter of substance. In effect plaintiff's two actions are the same: payment of the money due to him under the writ.

We are unable to see any difference and agree with the Native Commissioner's judgment dismissing plaintiff's summons with costs.

The appeal is dismissed with costs.

For Appellant: Mr. R. I. Michel of Messrs. Helman & Michel.

For Respondent: Mr. J. Fine, Johannesburg.

MAINTENANCE : TRANSVAAL ORDINANCE NO. 44 OF 1903.

CASE No. 17 OF 1950 (JOHANNESBURG).

CONRAD TZANIBE *v.* OSCARINA TZANIBE.

JOHANNESBURG: 15th June, 1950. Before H. F. Marsberg, Esq., President, and Messrs. P. H. Liefeldt and J. L. Pretorius, Members of the Court (Central Division).

Maintenance—Ordinance No. 44 of 1903 (T)—*Christian marriage —Husband cannot invoke Native Custom to free himself from his obligations.*

Claim: For maintenance in terms of Deserted Wives and Children Ordinance, No. 44 of 1903 (T).

Plea: None.

Judgment: Defendant to pay in £4 at the end of each month for the support of his wife.

Appeal: That the judgment is against the evidence and weight of evidence.

That the sum of £4 per month for maintenance is excessive.

Held:

(1) That as the maintenance ordered represents only one-third of his earnings it is not excessive.

(2) That defendant cannot invoke Native Custom to free him from the responsibility of supporting his wife and child in the environment in which he has chosen to live on the Reef.

Appeal dismissed.

Authorities: None.

Marsberg (President), delivering the judgment of the Court:—

In terms of the Deserted Wives and Children Ordinance, No. 44 of 1903 of the Transvaal, defendant, Conrad Tzanibe appeared before the Native Commissioner, Johannesburg, at the instance of his legally married wife, Oscarina Tzanibe, the plaintiff, who claimed a contribution towards her maintenance. After hearing the parties the Native Commissioner ordered defendant to contribute £4 a month for the support of plaintiff.

Defendant has appealed that the order was against the evidence and the weight of evidence and that the amount awarded was excessive.

The evidence discloses that the defendant owns a house in Johannesburg and earns £3 *a week*. There is an existing order of Court against him for payment of £1 a month for maintenance of his child. Plaintiff wishes to live with her husband in Johannesburg where he is in regular employment, whereas defendant desires her to live in Umzimkulu. Defendant unsuccessfully endeavoured to divorce his wife on the grounds of desertion. We think therefore that plaintiff is justifiably entitled to claim to live in Johannesburg where her husband has for the last 8 years resided and worked.

The Native Commissioner ordered him to pay his wife £4 a month maintenance which in our opinion is not an excessive amount. It represents only one-third of his earnings. On the evidence we are satisfied he is not at present supporting her. He has not shown in evidence that he has valid commitments which materially diminish his earnings.

Though the parties are married by Christian rites, defendant wishes his wife to live according to Native Custom, to which end he desires her to stay in Umzimkulu.

We agree with the Native Commissioner that defendant cannot invoke Native Custom to free him from the responsibility of supporting his wife and child in the environment in which he has chosen to live on the Reef. On the evidence before him the Native Commissioner was justified in making the order for maintenance and we see no reason to upset his decision.

The appeal is dismissed with costs.

In order to clear up what appears to be an uncertainty, the Native Commissioner's judgment is amended to read:—

> "Respondent is hereby ordered to pay in £4 (inclusive of the previous order of £1 awarded on 29th November, 1948), at the end of each month for the support of his wife. Payments to be made to Native Commissioner, Johannesburg.
>
> First payment on or before 10th April, 1950, and thereafter at end of each month."

For Appellant: Mr. E. Franklin, of Messrs. E. Gluckman & Son, Johannesburg.

For Respondent: In person.

DEFAULT JUDGMENT: RESCISSION.

CASE No. 18 OF 1950 (JOHANNESBURG).

MARTIN THABEDE *v.* **MICHAEL MNCUBE.**

JOHANNESBURG: 16th June, 1950. Before H. F. Marsberg, Esq., President, and Messrs. P. H. Liefeldt and J. L. Pretorius, Members of the Court (Central Division).

On date of hearing (14 *April*, 1950), *Legal representative advised trial court that they were abandoning the defence—Asked leave to be excused from appearing—Judgment given in default—On* 26 *April*, 1950, *defendant applied for rescission of default judgment based on entirely new defence—No explanation offered of defendant's absence—Particulars of new defence, if bona fide, should have been within knowledge of defendant and his attorney and should have been pleaded to plaintiff's claim—Application for rescission of judgment refused.*

Claim: Application for rescission of default judgment.

Plea: None.

Judgment: Application refused.

Appeal:

(1) That the Native Commissioner erred in law in dismissing the application.

(2) That the onus of proving that defendant was in wilful default did not rest with applicant.

(3) That the Native Commissioner erred in holding that it was necessary to state why the defendant in person did not appear.

(4) The Native Commissioner erred in disregarding the fact that the defendant need not appear personally but was entitled to appear through representation and if the representative does not appear through no wilful default on his part, the defendant should not be in a worse position.

(5) The Court should have allowed the application by reason of the substantial prejudice which defendant suffers through the judgment becoming a final judgment without affording the defendant the action on the merits.

(6) There is no evidence to show that the defendant was in wilful default.

Held:

(1) Where party has given notice that he is abandoning the defence, the only meaning which the Court could reasonably assign to his action would be that he was not opposing plaintiff's claim and that the judgment could go by default.

(2) A defaulting defendant who applies for a rescission of a judgment must disclose a good defence on the pleadings and cannot advance an entirely new defence.

(3) Explanation offered in the affidavits in support of the application for rescission is wholly irrelevant to the pleadings before Court.

The appeal is dismissed with costs.

Authorities: None.

Marsberg (President), delivering the judgment of the Court:—

In the Native Commissioner's Court at Johannesburg, plaintiff, Michael Mncube, sued defendant, Martin Thabede, for payment of £225. 14s., being the balance of the purchase price of a motor truck, viz. £215, plus interest thereon at 6 per cent. per annum amounting to £10. 14s. Defendant admitted the debt but alleged that by a subsequent verbal agreement between the parties he had been given an extension of time in which to pay the debt. He therefore pleaded that the claim was premature.

The case was set down for trial on 14th April, 1950. On that date before the trial the legal representative of the defendant informed the Court that *they were abandoning the defence* and asked leave to be excused from appearing in Court. Subsequently on the same day, defendant being in default, judgment was given in favour of plaintiff as prayed.

Thereafter on 26th April, 1950, an application was made by defendant through his legal representative for rescission of the default judgment. The application was supported by affidavits from defendant's legal representative and his clerk in which an entirely new defence, not embodied in the original pleadings, was sought to be set up. No explanation whatever of defendant's absence from Court was offered. If this new defence were bona fide the particulars were at all times within the knowledge of defendant and his attorney and should have been pleaded in answer to plaintiff's claim. This was not done.

Where a party has given notice that he is abandoning the defence the only meaning which the Court could reasonably assign to his action would be that he was not opposing plaintiff's claim and that judgment could go by default. Had he wished to raise a new defence he should have done so by way of application to the Court. Had he desired to contest the claim he could have applied for postponement of the case. A defaulting defendant who applies for rescission of a judgment must disclose a good defence to the action *on the pleadings*. He cannot advance an entirely new defence of which the opposite party and the Court are in ignorance. If he withheld that defence from the Court he is stopped from subsequently raising it. The explanation offered in the affidavits in support of the application for rescission is wholly irrelevant to the pleadings before the Court. The defendant and his attorney were aware of the set down of the case for trial, and they informed the Court that they were abandoning the defence. There was no misunderstanding of instructions between defendant and his attorney. We are therefore unable to see in what way defendant has suffered any prejudice by the proceedings in this case. In argument before us, defendant's Counsel devoted much time to the proposition that a party can, in terms of the rules, be represented by his gaurdian, and that it would not be necessary for a party to be present before the Court in person. We have no fault to find with this viewpoint. We can find no entry on the record, however, that defendant was in fact so represented. The only reference is that he was represented by attorneys. The argument to this extent is therefore fallacious.

The Native Commissioner refused to rescind the default judgment. He has given lucid and convincing reasons for his decision with which we are substantially in agreement. Viewed in the light of normal Court practice and procedure the actions of defendant and his attorney in this case are inexplicable to us. Taken at their face value they would appear to be wholly misleading.

The appeal is dismissed with costs.

For Appellant: Mr. H. Helman of Messrs. Helman & Michel, Johannesburg.

For Respondent: Mr. J. D. Krige, Johannesburg.

NATIVE CUSTOMARY UNION: PROPERTY RIGHTS AND RIGHTS OF SUCCESSION.

CASE No. 19 OF 1950 (KROONSTAD).

ASAEL MOHAKOE *v.* CECILIA RADEBE.

KROONSTAD: 18th August, 1950. Before H. F. Marsberg, Esq., President, and Messrs. D. J. van N. Groenewald and G. du Preez, Members of the Court.

Widow of a native customary union under guardianship—Legal position in regard to estate property—Estate devolves on heir who can dispose of it—Widow acquires no legal right to dispose of property.

Claim:

(1) An order for cancellation of the transfer of Stand No. 664B, Municipal Location, Kroonstad, and reinstatement of Cecilia Radebe with the stand.

(2) Damages in sum of £18.

(3) Payment of £13. 15s. for the use and occupation of the said stand by defendant.

(4) Alternative relief.

(5) Costs.

Plea: General denial and that the stand was sold by Cecilia Radebe (plaintiff) to defendant for £70. 10s.

Judgment: For plaintiff on count (1) with costs and absolution from the instance with costs on claims (2) and (3).

Appeal: That the judgment was:—

(1) Bad in law.

(2) Not supported or justified by the evidence adduced on behalf of plaintiff.

(3) Given against the weight of evidence.

Held:

(1) Grounds (1) and (2) of the notice of appeal not in compliance with the rules and are therefore struck out of the record.

(2) Defendant was at fault in purporting to deal with a widow who was herself under guardianship and was not in a legal position to enter into the transaction. Defendant did not acquire a valid title and cannot retain the stand in question. The plaintiff must be reinstated in possession.

The appeal is dismissed with costs.

Authorities:

(1) Rashula *v.* Masixundu, 5 N.A.C., 203.

(2) Mashia Dhlamini v. Piccanin Gatebe [1944, N.A.C. (C. & O.), 69].

(3) Whitfield's *South African Native Law*, pages 253-254.

Marsberg (President), delivering the judgment of the Court:—

In the Native Commissioner's Court at Kroonstad, plaintiff, Cecilia Radebe, through her guardian and curator *ad litem*, John Nthako, sued defendant, Asael Mahakoe, also known as Khattela Mahakwe for (*a*) an order cancelling the transfer of Stand No. 664B, Location, Kroonstad, in the name of the defendant, Asael Mahakoe, so that she be reinvested with the said stand; (*b*) payment of the sum of £18 as damages; (*c*) pay-

ment of the sum of £13. 15s. for the use and occupation of the said stand by defendant on allegations—

(1) (*a*) that prior to 9 December, 1948, plaintiff lived in the house of Stand No. 664 which was registered in the name of her deceased husband (by Native Custom), Joseph Radebe. Defendant had been and was on 9th December, 1948, a tenant in the house;

(*b*) on 9th December, 1948, the Native Commissioner of Kroonstad appointed the plaintiff to represent the Estate of the late Joseph Radebe with power *inter alia* to receive transfer of the building on the stand, which transfer was duly effected to plaintiff on the 10th December, 1948;

(*c*) on the same day, 10th December, 1948, the defendant by pretending to plaintiff that she should transfer the stand to her son, Philip Bhoma, owing to her infirmities fraudulently prevailed on her to transfer the stand to defendant;

(2) that defendant has collected rentals and converted the stand to his own use whereby plaintiff has sustained damages to the extent of £18;

(3) that defendant has not paid rental since September, 1948, amounting to the sum of £13. 15s.

Defendant denied the fraud but claimed that he had bought the stand from plaintiff for £70. 10s. He denied liability under claims (*b*) and (*c*).

Judgment was given in favour of plaintiff on claim (*a*) and absolution from the instance on claims (*b*) and (*c*). Defendant has appealed against the judgment on the grounds that it is against the evidence and the weight of evidence.

In limine Mr. van Reenen who appears for plaintiff (respondent), objected to the notice of appeal on the grounds that it does not comply with the rules of the Native Appeal Court. The grounds for appeal to which objection has been taken are as follows:—

(1) It is bad in law.

(2) The judgment given is not supported or justified by the evidence adduced on behalf of plaintiff.

(3) The judgment given is against the weight of evidence.

We agree with Mr. van Reenen in regard to grounds (1) and (2). The Native Appeal Court has frequently ruled that it is not a compliance with the rules to state that a judgment is " bad in law ". Appellant must state specifically in what respects the judgment is bad, and why.

Again, a judgment on fact is not based on the evidence given by plaintiff only but on the evidence of both parties considered together and as a whole. The second ground of appeal therefore is not a proper line of attack on a judgment. We order, therefore, that grounds (1) and (2) be struck out of the record.

In regard to (3) the Native Appeal Court has ruled that when a judgment is attacked on a question of fact it is sufficient to state as a ground of appeal that the judgment is against the evidence and the weight of evidence, without detailing the specific points of evidence involved.

We have *mero motu* drawn the attention of counsel to a point of law implicit in the case in regard to the legal property rights and rights of succession of the widow of a native customary union and have directed argument thereto. On the basis of this argument we are of opinion that the real issue in this case can be decided.

As it is clear that plaintiff is a widow in a Native customary union, it seems to be necessary to state what her legal position was in regard to the estate property. In the case of Rashula *v.*

Masixundu 5, N.A.C., 203, the Court said: "It has been held by this Court on numerous occasions to be indisputable Native Law that as long as she remains at her husband's kraal, or has not deserted the kraal, a widow is entitled to be properly maintained by the heir and to be consulted by him in the disposal of the estate property. The estate devolved on the heir, who controls it and can dispose of it for the general benefit of the family and the widow cannot claim to be placed in possession of it or prevent the heir disposing of it, provided she is maintained in a suitable manner." See Whitfield's *South African Native Law*, pages 253-254. We see, then, that when plaintiff's husband, Joseph Radebe died his property devolved upon a male heir, and that plaintiff herself acquired no rights in the property or any right to dispose of it. It is true that the Native Commissioner under his certificate authorised her to take transfer of the stand into her name but she acquired no legal or valid right to dispose of the property. She could therefore not pass title to anyone. Assuming that defendant did purport to purchase the stand for £70. 10s. he could not acquire valid title because plaintiff was not the owner of the property and could not pass ownership to anyone.

Mr. Dreyer, who appears for appellant (defendant), has argued before us that, on the point raised by the Court, the Native Law of Basutoland should apply. He quoted several authorities, one of which laid down that if there were no male heirs, the native customary widow becomes the heiress. We must point out, however, that the Native Law of defendant, if necessary, would be the system of law to be applied. Defendant himself in evidence claimed to be a Zulu. In this respect we would refer to the case of Mashia Dhlamini *v.* Piccanin Gatebe [1944, N.A.C. (C. & O.), 69] in which the Native Appeal Court held: "There are only two recognised tribal groups endemic in the province (O.F.S.). The Court is aware that there are representatives of many tribes resident on the farms and in the urban areas of the Free State. It is thus not prepared to accept the label "Basuto" as generic for the Free State. Nor is this Court prepared to look to Basutoland as the source of Native Law followed by the Free State natives generally. The law applicable in all cases is the law primarily of the tribe occupying a Native reserve and outside that area the law of the defendant's tribe is to be applied."

The plaintiff had no right to dispose of the property. The Native Commissioner did not deal with the matter on these lines, but after examining the evidence on the facts has arrived at a conclusion which has the same effect, viz. that plaintiff is entitled to be reinstated in the property. In the circumstances we do not consider it to be necessary to deal with the facts of the case. Defendant was at fault in purporting to deal with a widow who was herself under guardianship and was not in a legal position to enter into the transaction. Defendant did not acquire a valid title and cannot retain the stand in question. The plaintiff must be reinstated in possession. If defendant desires to pursue his claim for refund of any moneys paid he may do so by way of fresh action.

The appeal is dismissed with costs.

For Appellant: Mr. Dreyer, Kroonstad.

For Respondent: Mr. van Reenen, Kroonstad.

CHURCH DISPUTE.

CASE No. 20 OF 1950 (BLOEMFONTEIN).

THE SYNOD OF THE BANTU REFORMED CHURCH OF SOUTH AFRICA *v.* JONATHAN TSUENE AND 12 OTHERS.

BLOEMFONTEIN: 23rd August, 1950. Before H. F. Marsberg, President, and Messrs. H. A. van Rooyen and H. N. Doran, Members of the Court.

Actions by church bodies—The Synod of the Bantu Reformed Church of South Africa—Bodies must act in terms of their constitutions.

Claim: For delivery by the defendants to plaintiff of certain articles.

Plea:

(1) Defendants deny that the persons who purport to sue as the Synod of the Bantu Reformed Church of South Africa, are in fact the lawful Synod of the said church.

(2) Defendants deny that plaintiffs are entitled to claim, or are the owners of or entitled to the property claimed.

Judgment: Absolution from the instance with costs.

Appeal: Against the whole of the judgment delivered by the Native Commissioner on the ground that the judgment was against the evidence and the weight of evidence.

Held: That the Native Commissioner's finding that the plaintiffs had not proved their right to relief as against the defendants is correct.

The appeal is dismissed with costs.

Authorities:

Dwane *v.* Goza and Others, 17, E.D.C., 16.

Scoble on Evidence, pages 337-339.

Rex *v.* Hendrik Johannes, 1929, T.P.D., 273.

Marsberg (President), delivering the judgment of the Court:—

In the Native Commissioner's Court at Bloemfontein, plaintiffs, under the name of "The Synod of the Bantu Reformed Church of South Africa" sued defendants, Jonathan Tsuene and nine others, for delivery of certain articles which plaintiffs claimed to be their property. In the summons the parties are described thus:—

Plaintiff: "The Synod of the Bantu Reformed Church of South Africa", a religious organisation with headquarters at Germiston in the province of the Transvaal, and empowered by the said Synod's constitution and by special resolution of the said Synod duly assembled to institute this action, Elias Letsela, of 1539 Batho Location, Bloemfontein, in the District of Bloemfontein, being duly authorised by resolution of the said Synod to act in the name of the said Synod".

Defendants: First defendant, Jonathan Tsuene, by virtue of his former office as an Evangelist and officer of the plaintiff Church, and all the other defendants in their personal capacity and in their former capacity as members of the Church Committee of the Bloemfontein congregation of the "Bantu Reformed Church of South Africa".

It appears from evidence led in the case that this Church body was founded by Samson Ramokonopi in 1942 when he became President, with headquarters at Germiston. On the 22nd June, 1945, a document was drawn up, the preamble of which reads as follows:—

ELECTION OF THE SYNOD OF BANTU REFORMED CHURCH OF S.A., 22ND JUNE, 1945.

We hereby certify in the name of the High Synod of the Bantu Reformed Church of S.A. that the following are the proper Rules of the Constitution.

The following were elected Committee to draft Constitution in 1945:—

(1) Mr. J. Nkaki, Secretary.

(2) Rev. E. Aau, Chairman.

(3) Rev. S. Ramokonopi, Superintendent.

CONSTITUTION.

The relevant portions of the Constitution are:—

(2) Wherever Bantu Reformed Church exists the congregation is represented by a Committee of Elders and Officers, elected according to the Constitution, through Notices served for three weeks in Church. (See Exodus, Chap. 19, vs. 13-27. Acts, Chap. 6, vs. 1-6.)

(3) Every Bantu Reformed Church is represented by the Synod, that is by officers delegated by members of the Church by Ministers and Evangelists.

7. All Bantu Reformed Churches are to be as one body under one Law.

11. Church Committees are to solve all disputes and cases which affect the Church of God.

20. The Synod binds that any meeting of Ministers and Evangelists shall be summoned through a written application signed or recommended by the Ministers and Evangelists and this to be announced in Church for three weeks; if the meeting is approved or not this shall also be made in writing and announced in Church.

23. The Synod binds that a Minister, Evangelist or Church Elder who obstructs the work shall be summoned to the Church Committee immediaely and be shown his mistakes, if he refuses or ignores the call, shall at once forfeit his office on the written authority of the Superintendent and a Minister.

24. The Synod binds that Church ordinary members can only be dealt with by the Church Committee, but Elders and those in the service of the Church shall be dealt with by the Synod.

There is no provision whatever in this 1945 Constitution as to the manner in which Church Committees must be elected. Rule 2 states that Committees are "elected according to the Constitution" but as to the manner of election the rules are silent. Now, on the 22nd June, 1945, Jonathan Tsuene, first defendant, was appointed Evangelist at Bloemfontein. On 28th June, 1947, he appears to have been dismissed from office by resolution of a Synodal Committee and by written notice signed by E. M. Aau, Chairman, Samson Ramokonopi, President, Jacobs Nkoko, Secretary (Exhibit C).

Apparently first defendant did not give up his office or control of Church property. Legal proceedings followed against him before the Native Commissioner at Bloemfontein in 1948. A settlement was arrived at which was made an order of Court. The settlement required both contending Church Committees to resign, in order that a new Committee should be elected at a meeting called for the purpose under the Chairmanship of Mr. Viljoen, the Location Manager. As a result of this meeting all the present defendants, except first defendant, were elected to

the new Committee and they have taken control of the Church property at Bloemfontein for delivery of which they are now being sued by plaintiffs. Apparently the new Committee reinstated first defendant as Evangelist.

Plaintiffs purport to come into this case in the following manner. At a Synod held at Clocolan on 11 September, 1948, while fully supporting and confirming the judgment of the Native Commissioner on 4 August, 1948, they refused to confirm the election of the new Church Committee, they expelled first defendant from the Church, they (the Synod) "elected and confirmed the following members (16 mentioned) as a True Body of Counsellors of Bantu Reformed Church of S.A. in Bloemfontein". According to the 1945 Constitution there is no provision by which the Synod could itself appoint a Church Committee. Its action therefore in purporting to appoint the Bloemfontein Committee was unconstitutional. The present plaintiffs have stated that they were not prepared to abide by the Order of Court. Yet paradoxically they do seem to realise that a Church body, being a voluntary association, can obtain enforcement of its rules only by order of Court. In our opinion the Committee elected by the Church Congregation as a result of the order of the Court was properly elected and is or was the duly elected Church Committee at Bloemfontein. The Synod had no constitutional power or authority to discard or dismiss it. It is common cause in this case that there are two factions in the Bloemfontein Church, one supported by plaintiffs and the other represented by defendants. Plaintiffs section comprise 260 members whereas defendants' section have 500 members. Nevertheless, in pursuance of their dissatisfaction with the existing state of affairs and unwilling to give their support to the large majority of the members of the Church in Bloemfontein, the plaintiffs, as now represented by the persons who gave evidence in this case, again acted in an unconstitutional way when in June, 1949, at a Synod called at Germiston for the sole purpose of dealing with some trouble at Germiston in which the President of the Church was involved, they proceeded to draw up a new Constitution, in which, *inter alia*, they gave themselves tull control of all church property, they dismissed their President, Samson Ramokonopi, from the Church and they excommunicated the present defendants for "Having refused and failed to comply with the terms of agreement arrived at in the presence of the Native Commissioner on 17 September, 1949". (The date 17th September, 1949, is apparently intended for 4th August, 1948, as we can find no reference on the record to any agreement before the Native Commissioner on 17th September, 1949.)

We are totally at a loss to understand the reasons given by the Synod for the excommunication of defendants. The evidence discloses that defendants faithfully complied with the agreement arrived at before the Native Commissioner whereas the plaintiffs themselves are the very ones who have repudiated this agreement. It might be as well to quote an extract from the evidence to indicate the manner in which the affairs of this Church body seem to be conducted.

Esaia Aau, who claimed to be a member of the Synod of the Bantu Reformed Church and its Chairman stated: "The meeting took place in the Municipal Hall at Germiston. It was on 18th and 19th June, 1949. Rev. Ramokonopi was absent at the Synod meeting. He refused to come. He was given notice of the meeting. He was given written notice by the Secretary and I also wrote to him. Before 18-19 June, 1949, he was still a member of the Executive of the Synod. He was the President of the Synod before June, 1949, i.e. up to the time of the meeting of the Synod. He refused to call the meeting for the 18th and 19th June, 1949. I had a right to convene the Synod because I was the Chairman of the Synod. I spoke to Ramokonopi about trouble that we had at Germiston but he refused to

convene the Synod. I do not know why he refused. Ramokonopi was the President of the Executive Committee at that time and I was the Chairman of the Synod and Executive Committee. The Executive Committee had to appoint dates for the Synodal meetings. I told the President that there was trouble at Germiston and he said that I could convene a meeting but that he would not go to Germiston. He told me I can convene the meeting and the meeting was for the sole purpose of enquiring into the trouble at Germiston. That was the only notice that he had from me of the meeting. At this meeting (Synod) complaints were made against Mr. Ramokonopi and I then decided to discard him. Mr. Ramokonopi was informed of the complaints against him after he was discarded and also before the meeting. It was done in writing before the meeting. He knew what the position of the Synod was after the meeting of the Synod.

"The Constitution of the Bantu Reform Church, Ex. A. 1 was agreed to by the Synod on 18th and 19th June, 1949. The Bloemfontein Congregation of the Bantu Reformed Church was represented at the Synod by Letsela, Nkoale and I think Sillo. The Council elected in terms of the Court's Order was not represented at the Synod. Letsela and Nkoale and Sillo agreed to the Constitution of the Church. Ex. A. 1. They agreed on behalf of the Bloemfontein congregation. They agreed in writing to the constitution. They were given authority by the congregation of Bloemfontein and its Council to represent the Bloemfontein Congregation."

There is nothing in the Constitution to support or authorise the actions of this witness in his capacity as Chairman.

We are of opinion that here, too, the plaintiffs have acted in an unconstitutional way in adopting a new constitution without having convened a meeting of the Synod for that special purpose. Rule 3 of the 1945 Constitution lays down that delegates to the Synod must be chosen by members of the Church, Ministers and Evangelists. We have seen that the Synod, or may be Synod Committee, nominated their own committee at Bloemfontein and that members from this nominated committee represented Bloemfontein at the June, 1949, Synod at Germiston. These delegates were not elected, in terms of the Constitution, by members of the Church and they were therefore not duly constituted delegates or members of the Synod. The action of the Clocolan Synod was in conflict with the principles of natural justice in that they (the Synod) arbitrarily nominated a committee from among the minority section of the church congregation, in conflict with the right of the majority to elect their own Committee. Not only, therefore, was the Synod at Germiston in June, 1949, wrong in dealing with matters for which the Synod was not called together but its membership in so far as the delegates from Bloemfontein were concerned, was unconstitutional and any resolutions passed would be invalid (See Dwane *v.* Goza and Others, 17, E.D.C., 16).

One of the objections in defendants' plea to this claim was that the persons who purport to sue as the Synod of the Bantu Reformed Church of South Africa are not in fact the lawful Synod of the said church.

On a review of the evidence in this case we are gravely of opinion that there is substance in this allegation of defendants. The persons who appeared at the trial as representing the plaintiffs appear to have obtained control of the affairs of this church body by means which are not authorised in any written constitution. It is not our function to interfere in their internal affairs but where a body seeks to enforce legal rights, the possession of those rights must be clearly shown to be well founded. The Native Commissioner came to the conclusion that the plaintiffs had not proved their right to relief as against the defendants.

We are of opinion that the Native Commissioner's judgment was correct.

The appeal is dismissed with costs.

For Appellant: Mr. E. B. Horscroft, Bloemfontein.

For Respondent: Adv. J. P. G. Eksteen, instructed by Mr. Geo. Arvan, Bloemfontein.

DOGS: ATTACK BY: DAMAGES.

CASE No. 21 OF 1950 (JOHANNESBURG).

WILSON KGATLA *v.* SILAS SEKANO.

JOHANNESBURGH 11th October, 1950. Before H. F. Marsberg, Esq., President, and Messrs. W. J. M. Norton and E. V. C. Liefeldt, Members of the Court.

Dogs—Attack by—Damages—Pain and suffering—Damage to clothing.

Claim: £100 damages as a result of defendant's dogs attacking and injuring plaintiff.

(*a*) Clothes: £10.

(*b*) Bodily injuries, shock, pain and suffering: £90.

Plea: General denial.

Judgment: Pain and suffering £10.

Appeal: Damages inadequate.

Held: Appeal allowed. Appeal Court increases damages by £10.

Authorities:

May on Damages, 10th Edition, page 123.

McKerron on Delicts, 3rd Edition, page 165.

Turkstra, Ltd. *v.* Richards, 1926, TP.D., page 276.

Radebe *v.* Hough, 1949 (1), S.A.L.R., page 380.

Marsberg (President), delivering the judgment of the Court:—

In the Native Commissioner's Court at Johannesburg, plaintiff, Wilson Kgatla sued defendant, Silas Sekano, for £100 damages sustained as a result of defendant's dogs attacking and injuring plaintiff. The damages were computed as follows:—

(*a*) Damage to clothes £10

(*b*) Bodily injuries, shock, pain and suffering £90

At the end of the trial the Native Commissioner awarded plaintiff £10 for pain and suffering and nothing for damage to his clothing.

Plaintiff has appealed to us that the amount of damages awarded was inadequate in both respects.

In regard to the general damages based on pain and suffering we are of opinion, in the light of all the circumstances, that no good reason has been advanced to disturb the Native Commissioner's award of £10. The matter was one for the exercise of his discretion and we are unable to say that he has not dealt fairly with this issue. Although plaintiff was severly mauled by the dogs and according to the medical evidence must have suffered severe pain, no permanent injuries have been left and no shock has been sustained. His estimate of the pain and suffering in terms of monetary value has been unfortunately fluctuated from time to time and seems to have been largely affected by his feelings that defendant has been lacking in showing sympathy towards him in

his misfortune, Plaintiff has stated that if defendant had shown some outward interest in his suffering he would have been satisfied even with £1 for cigarettes. He would have agreed to a much lower payment of damages or expenses. The raising of the claim to one of £90 appears to be based on defendant's indifference rather than plaintiff's actual suffering.

On the claim for special damages for clothing, we consider the Native Commissioner has erred in not making an assessment. There is uncontradicted evidence by plaintiff that his clothes were ruined. He has detailed the various items of apparel and their cost. They were ruined beyond further use. The Native Commissioner appears to have considered that the clothing should have been produced in Court in proof of the claim but as there was no denial of plantiff's evidence there was no onus on plaintiff to do so. The onus of establishing that a plaintiff had not minimised the damages rests on the defendant. (See May on Damages, 10th Edition, page 123, and McKerron on Delicts, 3rd Edition, page 165.) Defendant has not discharged this onus. The Native Commissioner accepted the evidence of plaintiff in regard to the attack by the dogs and the injuries sustained and we consider he should have accepted plaintiff's statement of the extent of damage to his clothing. Plaintiff has stated that to replace the ruined articles of clothing will cost him £10. This figure is not unreasonable and bears some relation to the value of the clothing he was wearing at the time of the attack. We therefore assess the damages to the clothing at £10.

The Appeal is allowed with costs and the judgment on claim (*a*) or (I) is altered to read: For plaintiff (damages for clothing) for payment of the sum of £10.

(The judgment on claim II for £10 for pain and suffering will stand.)

We must point out that the record does not disclose that any plea or answer to plaintiff's claim was entered in terms of the rules for Native Commissioner's Courts.

For Appellant: Adv. R. N. Leon, instructed by Messrs. Gluckman & Kaplan, Johannesburg.

For Respondent: In person.

ADMINISTRATION OF ESTATES: ENQUIRY.

CASE No. 22 OF 1950 (VEREENIGING).

BENJAMIN TSHABALALA *v.* ESTATE LATE EMMA TUNZI AND WM. TUNZI.

JOHANNESBURG: 12th October, 1950. Before H. F. Marsberg, Esq., President, and Messrs. W. J. M. Norton and E. V. C. Liefeldt, Members of the Court.

Enquiry continued—See Case No. 9 of 1949—Further evidence—Claim now by Benjamin Tshabalala to inherit whole estate—Allegation that Emma Tunzi was not legally married to William Tunzi and that estate should not be administered under Common Law—Declaration by Benjamin on 11th June, 1947, that the said Emma Tunzi was subsequently married to James Tunzi of Roosboom—Held to afford strongest corroboration of marriage—Native Commissioner's determination under Common Law held to be correct—Consequently Benjamin Tshabalala and William Tunzi succeed equally to the estate.

Authorities:

Nyokana *v.* Nyokana, 1925, N.P.D., 227.

Registration of Marriages Law, No. 4 of 1887 (Natal).

Marsberg (President), delivering the judgment of the Court:—

On the 9th June, 1949, we delivered judgment on an appeal against the finding of the Native Commissioner of Vereeniging in an inquiry held in terms of section 3 of Government Notice No. 1664 of 1929, into the estate of the late Emma Tunzi. See Case No. 5 of 1949, in the Decisions of the Native Appeal Court, Central Division. Following our judgment the inquiry was reopened for the admission of further evidence.

On the 11th April, 1950, the Native Commissioner gave the following finding:—

> " On the further evidence available at this inquiry I find—
>
> *firstly,* that a customary union subsisted between Thomas Tshabalala and Emma Kumalo, that Benjamin Tshabalala is the eldest and only surviving child of that union;
>
> *secondly,* that a legal marriage in community of property existed between Emma Tshabalala (born Kumalo) and James Tunzi and that William Tunzi was the only son of that marriage; and
>
> *thirdly,* that in consequence of the above, Benjamin Tshabalala and William Tunzi succeed equally to the estate of their mother, Emma Kumalo.
>
> It is ordered that the costs of the respective parties in this and the preceding inquiry shall be defrayed from the estate and that any previous order in this connection is hereby rescinded."

Benjamin Tshabalala has appealed against that part of the Native Commissioner's decision in which he held that the late Emma Tunzi was legally married to William Tunzi and that the estate of the late Emma Tunzi should therefore be administered under Common Law.

The grounds of appeal are as follows:—

(*a*) That the said findings is against the evidence and the weight of the evidence adduced at the relevant enquiry.

(*b*) That the said decision is bad in law in that—

(1) there is no evidence to support such findings;

(2) the certificate issued by the Native Commissioner in 1942 is not admissible as evidence;

(3) the marriage certificate and/or witnesses who attended the alleged marriage between Emma Tunzi and William Tunzi should have been produced, or other legally acceptable evidence of marriage;

(4) the said finding is based on hearsay evidence and there is no explanation as to why direct evidence has not been brought;

(5) the onus of proving the existence of the said alleged marriage has not been discharged as required by law."

The Native Commissioner has dealt with the evidence in this inquiry in a carefully prepared and lucid judgment and we consider that he has arrived at a correct decision. The most vital evidence on the points raised in this appeal is that of appellant himself. In an affidavit made by him at Ladysmith, Natal, on 11th June, 1947, he declared that " the said Emma Tunzi was subsequently married to James Tunzi of Roosboom ". This declaration is wholly against his contention that Emma and James Tunzi were not married and we are unable to appreciate his attitude in seeking to suggest that there is no proof of this marriage. His positive declaration that there was such a marriage is binding on him and he cannot now be heard to assert the contrary.

Mr. Helman who appeared for appellant strenuously argued that the Native Commissioner was wholly unjustified in attaching importance to a certificate issued by Mr. McMaster, Additional Native Commissioner at Vereeniging in 1942, and asserted that apart from this certificate there was no evidence to prove the alleged legal marriage between Emma and James Tunzi. Against this contention Mr. Coetzee for respondent urged that marriage could rightly be presumed from the fact of cohabitation and birth of children and general repute. The evidence is clear that Emma and James Tunzi did cohabit as husband and wife, that a child was born and that for many years of widowhood Emma was known as Emma Tunzi. In the circumstances a marriage must be presumed and strong evidence would be needed to rebut this presumption. In the case of Nyokona *v.* Nyokona, 1925, N.P.D., 227, there are many points of similarity with the facts in this inquiry. The union of Emma and James Tunzi took place before 1880 in Natal. Objection was taken by Mr. Helman that no marriage certificate was produced. It has been pointed out to us, however, that there was no machinery in Natal for the registration of marriage before 1887. (Law No. 46 of 1887.) One quotation from Nyokona's case seems to be apposite:—

> "On the whole, while I cannot say that the question of the marriage is free from doubt I am not satisfied that there is that strong evidence against it which would justify me in regarding the presumption arising from the long cohabitation of these parties, coupled with their reputation as man and wife during that time, as rebutted. The evidence against it is that of witnesses, one at any rate of whom is wholly untrustworthy, another of whom has a strong interest to question the marriage, but does not seem to have done so until the question of succession arose, and none of whom is proved to be dealing with events which happened later than 1899 or 1900, and who speak to statements having been made, which it is perfectly possible, after the long time which has elapsed, may have become distorted in their recollection. On the whole, I come to the conclusion that there is no sufficient ground for holding that the magistrate has come to the wrong conclusion."

Even assuming that this were a marriage by Native Custom, appellant, Benjamin, would not benefit thereby. It is common cause that all the property in this estate was acquired by Emma by her own efforts after the death of the various men with whom she was associated. If Emma contracted a customary union after the death of Benjamin's father she ceased to be a member of his kraal and Benjamin could inherit nothing from the subsequent union.

According to pure Native Law no woman can own property, but the Native Appeal Court has held that a widow is entitled to retain in her own right property earned by her after her husband's death; the Court was aware that this is in conflict with Native Custom, but when Native Custom is repugnant to justice and equity it must give way. See Whitfield's *South African Native Law*, at page 263, and the cases there quoted.

Appellant, Benjamin Tshabalala, seeks to claim the whole estate on the ground that he is, by Native Custom, the sole heir from the union between Emma and her first husband, Thomas Tshabalala.

On no ground, either under Common Law or under Native Law can he succeed.

We conider that the Native Commissioner has justly dealt with the respective claims of the parties. His reasons for judgment clearly set out the facts and the law and we do not wish to add thereto. He has heeded the directions in our judgment of 9th June, 1949, and has exercised his discretion wisely.

The appeal is dismissed with costs.

For Appellant: Mr. Helman of Messrs. Helman & Michel.

For Respondent: Adv. G. A. Coetzee, instructed by Messrs. Smit & Malan, Vereeniging.

GUARDIANSHIP: REMOVAL OF CHILDREN: SPOLIATORY ACTION.

CASE No. 23 OF 1950 (JOHANNESBURG).

(1) JOHANNA RAMANO. (2) JOSEPH RAMANO *v.* PHILLIP MAPULA.

JOHANNESBURG: 16th October, 1950. Before H. F. Marsberg, Esq., President, Messrs. W. J. M. Norton and E. V. C. Liefeldt, Members of the Court.

Customary union—Guardianship of children—Removal of children from control of putative father by aunt of children—Aunt claiming to be guardian—Spoliatory action.

Claim: Order for delivery of two female children wrongfully and unlawfully and without knowledge and consent removed from his control by defendants.

Plea: Removal admitted. Paternity of plaintiff denied. Female defendant claims to be natural guardian.

Judgment: For plaintiff as prayed.

Appeal:

(*a*) On facts.

(*b*) On law:—

(1) Relief granted greater than claimed in summons.

(2) Native Commissioner erred in finding that customary union has been entered into.

Held:

(1) Facts support Native Commissioner's judgment.

(2) As between parties to action there is *prima facie* proof of customary union.

Female defendant not natural or legal guardian.

Spoliatory action in respect of human beings improper—action should be for declaration of rights—judgment corrected.

Appeal dismissed.

Authorities:

Matthews *v.* Haswari, 1937, W.L.D., page 110.

Whitfield's *South African Native Law,* page 148.

Stafford, page 68.

Matozini *v.* Ntsume, P.H., 1948 (2), R.

Carns Executors *v.* van Graan, 1912, A.D., page 186.

B. Hibbins *v.* Durban Borough Council.

Marsberg (President), delivering the judgment of the Court:—

In the Native Commissioner's Court at Johannesburg, plaintiff, Phillip Maputa, sued defendant, Johanna Ramano and Joseph Ramano, husband of Johanna, for an order for delivery to him of two female children, Nana and Fanny, age 16 and 17 years respectively, who plaintiff claims were his children, removed

wrongfully, unlawfully and without his knowledge and consent from his home at Sibasa in the Transvaal by defendants during December, 1949.

Defendant, Johanna, admitted removing the children, but alleged that plaintiff was not the father and that she was the natural guardian and entitled to their custody, as the mother, whom plaintiff claimed to be his wife, was her younger sister and there were no male relatives in the family.

Certain facts were admitted by the parties, viz:—

1. The children were born before the alleged marriage between plaintiff and their mother, Mita.
2. There were lobola negotiations, in pursuance of which some payments were made by plaintiff to first defendant.
3. That the children were staying at plaintiff's kraal at the death of their mother and were fetched therefrom by first defendant.
4. Actual paternity of children is in dispute.
5. Plaintiff is a Motsweda of Venda Tribe and first defendant is a Mokwena of the tribe in Rustenburg.
6. Only matter outstanding is who is natural father of the children, as this is disputed on both sides.

During the course of the trial it was sought on behalf of defendant to show that one Thomas Mokwena was the father of the children. He was called as a witness, but was not made a party to the action. It is clear from the evidence that for a short while before plaintiff took Mita and the two children to his home at Sibasa, plaintiff, Mita and the children lived together in Johannesburg. Three months after Mita and the children went to Sibasa Mita died. First defendant in evidence states: "I know plaintiff, Phillip, in this matter. I first met him in 1947. He came to my house with Mita. There was no discussion. Mita came to introduce him to us, as a man who was courting her. Afterwards we discussed their marriage. Plaintiff said he wanted to pay lobola for my sister, Mita. *We agreed upon lobola in* £40. Plaintiff paid £11 on first occasion . . . . I got a futher sum of £6 from plaintiff in 1948." It is clear also that about this time plaintiff and Mita and the children lived together until they were taken to Sibasa. The necessary elements of a customary union are present and we are satisfied that a customary union between plaintiff and Mita did take place. It is admitted that the children were born before the union took place. If plaintiff was the natural father the rights in the children would be his, as any claims concerning the children would be merged and liquidated in the payment of lobola. As no action was taken by first defendant or any member of her family in regard to the birth of the two children, they can have no better right to the children than plaintiff. The presumption of legitimacy must be exercised in favour of the children. As between plaintiff and defendants. the parties to this case, the presumptions and probabilities are in favour of plaintiff.

Moreover, plaintiff gave evidence of long association and intimacy with Mita and claimed that he was the father of the two children. Against this defendant alleged that Thomas Mokwena was the father. The basis of defendants case was that first defendant was the guardian of the two children in default of male guardians but the introduction of their witness, Thomas Mokwena had startling consequences. He stated that he had married Mita by Native Custom on payment of lobola. If that be true, then, defendant cannot be the legal guardian of the children, for Thomas himself would be their guardian. Defendants would be entirely out of Court as they could have no legal rights in respect of the children.

In this case, however, we are concerned only with the parties to the action. First defendant, in our opinion, had no legal

right to remove the children from plaintiff's control, and had the action been spoliatory, as it purports to be, plaintiff would be entitled to the judgment given by the Native Commissioner in his favour. But we must point out that the subject matter of this action is human beings, not chattels. Claims in actions of this nature should be in the form of a declaration of rights. It is entirely irregular to seek an order for the delivery of children. We observe that the Native Commissioner was perturbed on this aspect of the case and rightly so. Matthews *v.* Haswari, W.L.D., 1937, page 110.

Mr. Brodie, for defendants (Appellants) commendably admitted the difficulty facing him in arguing the case, in view of the decisions of the Courts that guardianship in Native Law is resricted to males. First defendant, a female, in Native Law is incapable of exercising rights of guardianship and on that score she is unable to resist plaintiff's claim. In her plea defendant claimed that she was the natural guardian. This of course is not so, nor, as we have pointed out, is she the legal guardian. On the evidence in this case there is no doubt that plaintiff is entitled to claim that the children be returned to him.

Mr. Brodie took the further point that there could have been no customary union between plaintiff and Mita because the lobola negotiation and agreement to pay dowry were transacted with females. There is provision, however, in Native Law, for dowry to be paid to a person other than the true guardian. The expression "dowry holder" includes a person to whom the dowry has been paid. See Whitfield's *South African Native Law,* at page 148, and the case there quoted. It is not necessary for the purposes of this case to decide whether a woman cannot be a dowry holder because that is not in issue and on other grounds it is clear that defendant has no rights of guardianship over the children.

The appeal is dismissed with costs. We must, however, exercise our powers of correction to ensure that the judgment be properly expressed. The judgment of the Native Commissioner is altered to read:—

> "As between the parties to this case plaintiff is declared to be the gaurdian of the two children, Fanny and Nana, and entitled to their custody. Defendants to pay costs."

At the outset an application for condonation for the late noting of this appeal was considered. We were satisfied that there was reason to believe that some misunderstanding might have existed between the defendants and their attorney in regard to the noting of the appeal which provided a reasonable excuse and explanation of the delay. Although the probability of success might be dubious, in view of the fact that children are involved we were prepared to grant indulgence and the irregularity was accordingly condoned.

For Appellant: Adv. J. Brodie, instructed by Messrs. Gratus, Sacks & Melman, Johannesburg.

For Respondent: Mr. D. I. Gordon, Johannesburg.

URBAN LOCATIONS: ARBITRATION.

CASE No. 24 OF 1950 (GERMISTON).

SAMSON DWEKO *v.* GERT LELALA.

JOHANNESBURG: 16th October, 1950. Before H. F. Marsberg, Esq., President, Messrs. W. J. M. Norton and E. V. C. Liefeldt, Members of the Court.

Urban Location—Alberton, Germiston—Rights of site permit holder sold to two independent purchasers—Action and counter-action between purchasers for declaration of rights—No privity between parties—Actions in rem—*Actions* in personam—*Claims in reality submission to arbitration—Not appealable.*

Claim: Declaration of rights in regard to certain stand in Alberton Location.

Plea: Counter-claim for same rights.

Judgment: For plaintiff as prayed.

Appeal: On questions of law (not considered).

Held: As evidence shows that site permit holder sold his rights to two independent persons without due transfer of rights to either, action as between the two purchasers discloses no privity as between themselves. Therefore, neither claim nor counter-claim can be entertained.

In actuality, actions resolved themselves into a submission to arbitration.

Native Appeal Court not concerned.

Claim and counter-claim dismissed.

Authorities: Johanna Mahonge *v.* Knot Nakanaka, 1945, N.A.C.T. (T. & N.), 21.

Marsberg (President), delivering the judgment of the Court:—

In the Native Commissioner's Court at Germiston, plaintiff, Gert Lelala, sued defendant, Samson Dweko, for a declaration of rights that plaintiff is the owner of certain Stand No. 338, situate in the Alberton Location on the grounds that he, plaintiff, purchased the said stand from the registered site permit holder, one Paul Sotetsie. Defendant counterclaimed for a similar order on the grounds that he purchased the said stand from Paul Sotetsie. In the summons it was alleged that plaintiff and defendant are both claimants as owners of the stand. Defendant in his plea admitted this allegation.

The subject matter of the dispute is not the actual ownership of the site in the native location, the dominium in which is by law vested in the Municipality, but the rights of occupation and the right to remove buildings thereon. These rights are evidenced by a site holder's permit, issued by the Location Superintendent.

From the evidence led in the case certain facts emerge:—

1. On the 2nd April, 1950, the said Paul Sotetsie, the registered site permit holder, sold his rights to plaintiff. This transaction is amply proved by a document, exhibit B, and the evidence of witnesses.
2. On 15th April, 1950, Paul Sotetsie purported to sell the same rights to defendant, in terms of document exhibit A.
3. For certain reasons the Superintendent of the location has not transferred by registration these rights to either plaintiff or defendant.
4. The registered site permit holder is still Paul Sotetsie.

Now, it must be observed that neither plaintiff nor defendant has been put in possession of the rights relating to this stand, and therefore, neither is in a position to exercise any rights *in rem*. Whatever rights may have accrued as the result of their transactions with Paul Sotetsie are at this stage merely rights *in personam*. The latter rights can be maintained by either plaintiff or defendant against Paul Sotetsie only, but as there is no privity between plaintiff and defendant neither has a right of action against the other. Both the claim and counterclaim are based on rights *in rem*, rights which neither party possesses. The actions are premature and appear to have been misconceived. They certainly are not based on any legal rights as between the two parties involved. Both parties may have a cause of action against Paul Sotetsie but they have none as between themselves.

According to the pleadings they have both agreed to submit the dispute (as to the ownership of the said stand) to the Native Commissioner at Germiston. In view of the position in which they stand to one another, at most this submission can have no greater effect than a submission to arbitration, in other words to have it determined which of them has the better claim for transfer of the site permit from the seller, Paul Sotetsie. On the evidence before him the Native Commissioner preferred the claim of plaintiff. To that extent we are of opinion that he was correct in his decision. A submission to arbitration is not, however, appealable and it seems to be a matter in which we as a Court of Appeal are not concerned.

So far as this action and counter action purport to be claims for the enforcement of legal rights we must hold that both parties are entirely out of Court, as neither has a cause of action against the other.

It is ordered that both claim and counterclaim be dismissed. There will be no order as to costs either in this Court or the Court below.

For Appellant: Adv. E. S. D. Levey, instructed by Mr. Bernard Hertzberg, P.O. Box 436, Germiston

For Respondent: Mr. S. J. Naude, P.O. Box 6, Alberton.

PURCHASE AND SALE: MOTOR CAR.

CASE No. 25 OF 1950 (JOHANNESBURG).

PHILEMON MTETWA *v.* **LAWRENCE BONDIE GULE.**

JOHANNESBURG: 17th October, 1950. Before H. F. Marsberg, Esq., President, Messrs. W. J. M. Norton and E. V. C. Liefeldt, Members of the Court.

Sale of motor car—Written agreement—Claim for balance due—Pleadings—Set-off—Onus of proof—Shifting of onus—Calculation of balance due.

Claim: Claim for balance due on sale of motor car, £257.

Plea: Agreement admitted. Set-off of various expenses. Statement of accounts inter partes.

Judgment: Absolution from the instance.

Appeal: Native Commissioner erred.

Held: Pleadings misconstrued. Plaintiff had discharged onus so far as it lay on him. Defendant had case to meet. Appeal allowed.

Authorities:

Kuritsky *v.* Messett and Another, 1921, C.P.D., page 777.

Bodiker and Company, Ltd. *v.* Neugbauer & Co. Ltd., 1926, A.D., page 17.

Estates Hoskins *v.* Colonial Mutual Life Assurance Society, 1913, W.L.D., page 120.

Jones & Buckle, pages 360, 361.

Scoble, 2nd Edition, page 67.

Marsberg (President), delivering the judgment of the Court:—

In the Native Commissioner's Court at Johannesburg, plaintiff, Philemon Mtetwa, sued defendant, Lawrence Bondie Gule, for payment of the sum of £257, being the balance due on the sale of a motor car. As the judgment in this case turned on the construction and interpretation of the pleadings it is necessary to quote them.

The particulars of the claim in the summons were:—

1. On or about 1st September, 1948, the plaintiff sold to the defendant motor car T.J. 3561 for the sum of £400.
2. It was a condition of the said agreement that the sum of £43 was to be paid in cash; on 1st September, 1948. £100 on transfer of the car to defendant; and the balance to be paid within six months from the date of transfer.
3. The car was transferred to the defendant by the 1st September, 1948.
4. In the premises the full amount of the purchase price of the said car was to have been paid to the plaintiff by 31st March, 1949.
5. The defendant has paid the following amounts to the plaintiff: The sum of £40 by way of sett-off during August, 1948; the sum of £3 during August, 1948; the sum of £100 during September, 1948; making a total of £143, and thereby leaving a balance of £257.
6. The defendant, notwithstanding demand refuses and/or neglects to pay the said sum of £257 which sum is due and payable.
7. Wherefore plaintiff claims from the defendant the said sum of £257.

Defendant's plea reads as follows:—

1. Defendant admits paragraphs 1 and 2 of the summons.
2. Defendant denies paragraph 3 of the summons.
3. Defendant states that it was a condition of sale that the plaintiff should deliver the motor vehicle to defendant together with a roadworthy certificate. The motor vehicle at the time when the deed of sale was entered into, was not fit for the road, and in order to render the said motor vehicle roadworthy, the defendant caused repairs to be effected thereto and amounting to the sum of £57. 18s. In addition, in order to pass the roadworthy test the motor vehicle required five new tyres as the tyres then on the vehicle were condemned. The cost of five new tyres was £33. 11s. 4d. The plaintiff agreed to allow to defendant a credit for the repairs and the tyres.
4. Plaintiff is indebted to the defendant in the sum of £110 in terms of a written acknowledgment of debt dated the 12th July, 1948, and defendant is entitled to set off the said sum on account of the purchase price of the motor vehicle hereinbefore referred to.
5. Prior to September, 1948, the defendant at the plaintiff's special instance and request, purchased a motor car radio for and on behalf of the plaintiff at the cost of £27. 10s. and caused same to be fitted to the motor vehicle. Plaintiff was thus indebted to the defendant in the said sum of

£27. 10s. and which sum defendant has set off against the purchase price of the motor vehicle. When the motor vehicle was sold as hereinbefore mentioned, the purchase price included the radio.

6. In addition and after the sale aforesaid, by agreement between the parties, the plaintiff removed the radio from the motor car and agreed to deduct the amount of £27. 10s. from the purchase price.

7. In addition, the plaintiff had not licensed the vehicle for the year 1948, and the defendant at the plaintiff's request disbursed the amount of £10. 16s. on his behalf, in order that the plaintiff would be able to effect the registration of the transfer into the name of the defendant.

8. Further payment made by the defendant on account of the purchase of the said motor vehicle were £43 on the 1st of September, 1948; £100 on the 9th September, 1948. Defendant thus denies that he is indebted to the plaintiff in the sum claimed or any other sum.

Wherefore defendant prays that the summons may be dismissed with costs.

The position therefore *inter partes* is as follows:—

	£	s.	d.	£	s.	d.
By purchase of price of motor car				400	0	0
To costs of repairs	57	18	0			
To costs of tyres	33	11	4			
To acknowledgement of debt dated 12th July, 1948	110	0	0			
To cash disbursed by defendant *re* radio	27	10	0			
To radio removed by plaintiff ...	27	10	0			
To cash disbursed by defendant *re* licence	10	16	0			
To cash 1st September, 1948	43	0	0			
To cash 9th September, 1948	100	0	0			
By amount overpaid				10	5	4
	£410	5	4	£410	5	4

When argument ensued on this question defendant contended that the only point before the Court was the claim for £257 and plaintiff had adduced no evidence as to how that amount was arrived at. Defendant contended, moreover, that the pleadings were a denial that this or any amount was owing by him. Had defendant's plea been a simple denial of plaintiff's claim we could understand his contention, but his plea was an elaboration of the position of the parties. He admitted that the purchase price of the motor car was £400, but by virtue of a number of debits detailed in the plea no balance was due by him. The onus of proof of a number of these items would rest on defendant. Now, plaintiff's claim for £257. according to the summons, is plainly for the balance due, being £400 less £143 cash paid, which defendant admits and sets forth in the plea—*vide* " the position *inter parties* ". The onus of proof of all the other items mentioned therein rested on defendant.

Reading the claim and plea together fairly we are at a loss to understand the difficulty which appears to have confronted the Native Commissioner.

There is unanimity that the purchase price was £400. There is unanimity that £143 was paid in terms of the agreement. Mathematical calculation would determine the balance to be £257, the amount claimed by plaintiff. No proof was needed to arrive at this sum. At that stage the Court could confidently have held that the plaintiff had established a *prima facie* case and that there was a claim which the defendant was required to meet.

It is well established procedure in Courts of law that the onus can shift at various stages. It is not a question of the submission of evidence piece-meal. In Court practice it is ruled that the plaintiff shall first adduce his evidence in so far as the burden lies on him and that the defendant shall thereupon adduce all his evidence, after which the plaintiff may again be heard.

The Native Commissioner granted absolution from the instance at a stage of the proceedings when evidence called by plaintiff only in respect of the roadworthiness of the motor car had been reached. In his reasons for judgment he states that plaintiff gave no evidence as to how he arrived at his balance due of £257. We have pointed out, however, that this is abundantly clear from the pleadings.

Plaintiff has appealed against the judgment and has taken 19 grounds on which he alleges the Native Commissioner has erred. It is unnecessary to detail or consider all these points. We are of opinion that the purport of the pleadings has been misconstrued and that the Native Commissioner erred in granting absolution from the instance.

The appeal is allowed with costs. The judgment of the Native Commissioner is set aside and the case is returned for further disposal.

For Appellant: Mr. D. I. Gordon, instructed by Mr. E. Gordon, Johannesburg.

For Respondent: Mr. H. Helman, of Messrs. Helman & Michel, Johannesburg.

CHRISTIAN MARRIAGE: PAYMENT OF DOWRY FOR ANOTHER WOMAN DURING SUBSISTENCE THEREOF IRRECOVERABLE.

CASE No. 26 OF 1950 (JOHANNESBURG).

LAWRENCE GULE *v.* DICK KUZWAYO.

JOHANNESBURG: 19th October, 1950. Before H. F. Marsberg, Esq., President, Messrs. W. J. M. Norton and E. V. C. Liefeldt, Members of the Court.

Christian marriage—Dowry paid in contemplation of union with another woman—Contra bonos mores—*Irrecoverable.*

Claim: Payment of £50 and £21 alleged to be loan by plaintiff to defendant and money disbursed on defendant's behalf.

Plea: General denial.

Judgment: Absolution from the instance.

Appeal: Questions of fact and other grounds.

Held: As evidence disclosed that payments made were in respect of lobola for a woman other than plaintiff's wife during subsistence of his legal marriage with latter transaction was *contra bonos mores* and repayment not recoverable by action at law.

Appeal dismissed. Judgment altered to read: "Summons dismissed with costs.

Authorities:

Whitfield's *South African Native Law*, pages 557 and 558.

Solomon Mlangeni *v.* Isaac Dhlamini, 1948, N.A.C. (C.D.), page 10.

L. Nzimande *v.* J. Sibeko, 1948, N.A.C. (C.D.).

Scoble—2nd Edition, page 308.

Marsberg (President), delivering the judgment of the Court:—

In the Native Commissioner's Court at Johannesburg, plaintiff, Lawrence Gule, sued defendant, Dick Kuzwayo, for payment of two claims of £50 and £21, alleged respectively to be—

(*a*) a loan made by plaintiff to defendant on or about 10th January, 1948 and;

(*b*) money disbursed by plaintiff on defendant's behalf at the latter's special instance and request.

Defendant denied the allegations.

At the end of the trial after both parties had adduced their evidence the Native Commissioner found "that there was no reliable evidence of an actual agreement of loan between plaintiff and defendant. The evidence of plaintiff's witnesses gives every indication of a lobola transaction between plaintiff and defendant".

The evidence clearly discloses that plaintiff, a man married by Christian rites, entered into negotiations with defendant to marry the latter's daughter and during the subsistence of the lawful marriage paid to defendant an amount of £50 as lobola in anticipation of a marriage to be contracted after he had obtained a divorce from his wife.

The Native Commissioner held that this transaction was illegal and the lobola could not be reclaimed. He entered judgment of absolution from the instance with costs.

Plaintiff has appealed against this judgment on a number of grounds, one of which is that the judgment is against the evidence and the weight of evidence. On this score we are in entire agreement with the Native Commissioner's assessment of the evidence. There is no proof whatever that the sums of money claimed by plaintiff were in respect of a loan or money disbursed on defendant's behalf.

It seems superfluous to inquire into the other grounds of appeal because the Native Appeal Courts have already laid down in a number of cases that lobola paid by a man, married by civil law or Christian rights, for another woman during the subsistence of his marriage cannot be recovered by legal action, because the transaction is wholly illegal. This matter is explained in Whitfield's *South African Native Law*, at pages 557-558. The cases in point are there quoted.

On this aspect of the case Mr. Helman for plaintiff (appellant) has argued that there is no reference in the pleadings and this matter is not in issue. We must point out, however, that it is the duty of all Courts to ensure that no effect shall be given to agreements which are based on illegal considerations or which are against public policy. Such an unlawful transaction has been disclosed by the proceedings in this case. We are therefore unable to give relief to plaintiff on an action which is entirely *contra bonos mores* and in which he is the main wrongdoer.

The appeal is dismissed with costs.

The judgment of the Native Commissioner is altered to read: "Summons dismissed with costs."

For Appellant: Mr. H. Helman of Messrs. Helman & Michel, Johannesburg.

For Respondent: Dr. P. Ka I. Seme, Johannesburg.

UNLAWFUL ARREST: DAMAGES.

CASE No. 27 OF 1950 (JOHANNESBURG).

EDWARD KUMALO *v.* JAMES MOLAPO.

JOHANNESBURG: 20th October, 1950. Before H. F. Marsberg, Esq., President, Messrs. W. J. M. Norton and E. V. C. Liefeldt, Members of the Court.

Unlawful Arrest—Non-payment of water rates—Damages—Inadmissible evidence—Information as to likelihood of person acting in a certain manner—Evidence of character—Propensity—Similar facts—Collateral facts— Malice—Excessive damages.

Claim: £100 damages for unlawful arrest.

Plea: Denial.

Judgment: For plaintiff for £50 damages.

Appeal: On facts—Inadmissible evidence—Damages excessive.

Held: Appeal allowed. Great deal of evidence inadmissible. Nominal damages assessed by Appeal Court at £10.

Authorities:

Scoble on Evidence, pages 91, 96, 109.

Phipson's Laws of Evidence.

McKerron, Law of Delict.

Cockles Statutes—7th Edition, page 116.

Marsberg (President), delivering the judgment of the Court:—

In the Native Commissioner's Court at Johannesburg, plaintiff, James Molapo, sued defendant, Edward Kumalo, for payment of £100 damages on the allegation that on or about 31st October, 1949, and at Albertynsville, Johannesburg District, the defendant wrongfully and unlawfully and maliciously arrested and/or caused the arrest of the plaintiff, depriving him of his liberty.

Defendant denied the allegations of plaintiff and put him to the proof thereof and denied that he had suffered any damages.

After a lengthy trial the Native Commissioner found in favour of plaintiff and awarded him £50 damages and costs.

Defendant has appealed against the whole judgment on the grounds that the judgment is against the evidence and the weight of evidence; that despite objections the Native Commissioner admitted evidence tending to give information as to the likelihood of the defendant acting in the manner alleged in the summons, such evidence in law being inadmissible; and that the Native Commissioner was in fact influenced by the said inadmissible evidence in arriving at the conclusion that the defendant acted in the manner alleged in the summons. Defendant also contended that the award of £50 damages was in the circumstances exorbitant and excessive.

Inadmissible evidence.

In his reasons for judgment the Native Commissioner states:—

> "A whole series of questions was asked of the plaintiff which could have but one motive, namely to investigate the character of plaintiff, with emphasis on the less favourable characteristics."
>
> Later, when the defendant went on oath to give his testimony, he was also asked questions which followed the pattern and tendency outlined in the previous paragraph, amongst others, his history before the Courts, his admini-

stration of justice in the camp, etc. The Defence was extremely sentitive to any suggestion of bad character, other similar cases in other Courts, anything said by the defendant in connection with his work at Albertynsvlei, in fact a whole series of objections were lodged to questions and answers. The majority of these objections were overruled on the grounds that they might give information as to the likelihood of the defendant acting in the manner complained of in this case. He is sued for acting unlawfully and it is most relevant to know if he is the sort of person who might take the law into his own hands, particularly, where it is denied that he did the unlawful act complained of, the probability factor becomes very important.

A great deal of the evidence in this case has very little bearing on the actual facts complained of, but that portion of the evidence which deals with the administration at Albertynsvlei is of the very greatest importance when motive, opportunity, and the defendant's mandate and authority are examined."

In argument on this point, Mr. Brodie, for appellant quoted the text writers, Scoble and Phipson on the Laws of Evidence.

It will suffice to quote from Scoble, 2nd Edition, as all the authorities are to the same effect:—

At page 91: (*a*) *Similar or Collateral Facts.*

"Facts which are relevant merely by reason of their general similarity to the main fact, but which are not specifically connected therewith, are not admissible to prove its existence; nor, to prove a given fact or act, is it permissible to prove similar acts having been performed, either by the party himself or by others, in order to show a disposition or propensity or habit to do the act in question, and thus to raise an inference that the act was probably or possibly done on the occasion in question [Rex v. Davies (1925), A.D., 35]. Consequently, on a charge of defamation, the Crown may not, in support of its case, lead evidence that the accused had, on a previous occasion, made a statement similar to that complained of [Rex *v.* Smith (1935), T.P.D. P.H., H. 91)]. Unless, therefore, there is some specific connection between the other acts or conduct of a similar nature to the act or conduct forming the subject matter of the enquiry, evidence thereof is inadmissible [Rex *v.* Janks (1913), T.P.D., 382; Rex *v.* Lipschitz (1913), T.P.D., 652; Rex *v.* Mitchell (1929), T.P.D., 727; Rex *v.* Alberts (1922), T.P.D., 225]."

The reason or basis for the rule is that facts of this nature, though logically relevant, are rejected as legal evidence on the grounds of convenience, since (*a*) they tend to prolong the proceedings unduly, (*b*) they are calculated to embarrass the jury, or court, by necessitating an enquiry into collateral issues, (*c*) the inferences to be drawn are too remote, and (*d*) such a procedure would encourage attacks on the other party without notice. The rule is expressed in the maxim *res inter alios actae alteri nocere non debent,* which in passing, is somewhat defective in its denotation, since there are in fact *res inter eosdem* which are also inadmissible.

At page 96: *Predisposition.*

Evidence of propensity or predisposition, that is, that the person concerned is, from his temperamental nature, likely to have performed the act in question, or make the statement alleged, is inadmissible [Rex *v.* Davis (1925), A.D., 45; Rex *v.* B. (1944), S.R. (P.H., H., 73)].

At page 109: (2) *Bad Character.*

While in everyday life the bad character of a party might logically be regarded as being a pertinent and relevant factor

to be considered in the determination of an issue, yet, from a legal point of view, all reference to such character must in general be excluded, not because it is logically irrelevant, but on the grounds of public policy and fairness, since its admission would cause surprise to, and prejudice the other party by raking up the undesirable features of the whole of his career, which he could not be prepared to defend without notice, and also because the damage done, by revealing his bad character to the court or jury would harm him to such an extent that it is doubtful whether he would really obtain a fair hearing on the matter in issue. The rule therefore is that, only in cases where the party's character is actually in issue may evidence thereof be allowed. Such would be the case where a creditor seeks to remove a trustee from office on the grounds of turpitude or misconduct [Hall *v.* Fitsgerald, 12 S.C., 277; Rex *v.* Knothe (1916), T.P.D., 473].

(*a*) *Character of the Parties.*

(i) *In Civil Cases.*—In civil cases, evidence as to the character of the parties is inadmissible unless it has actually been placed in issue by the pleadings [Solomon *v.* Roomson, (1927), N.P.D., 125], or where the measure of damages is made to depend upon it, such as is the case in actions for:—

1. Defamation.
2. Seduction.
3. Breach of Promise.
4. Divorce.

Mr. Helman, for respondent, accepted this statement of the law. We see, therefore, that in spite of the strict injunctions of the laws of evidence "a great deal of evidence in this case (to quote the words of the Native Commissioner) has very little bearing on the actual facts complained of". Such evidence should not have been admitted at all, as it was entirely inadmissible. One of the grounds of appeal is that the Native Commissioner was in fact influenced by the inadmissible evidence in arriving at his conclusion and particular emphasis was laid by Mr. Brodie on the passage from his judgment wherein he stated that the objections were overruled on the grounds that information might be given as to the likelihood of defendant acting in the manner complained of and that it was most relevant to know if he was the sort of person who might take the law into his own hands. The judgment indicates that the Native Commissioner was so influenced. On general principle it might be held that defendant was thereby prejudiced but in considering such a state of affairs the Native Appeal Court is expressly directed by Statute not to upset a judment on the ground of irregularity unless it be satisfied that substantial prejudice has resulted. Admittedly in this case the bulk of the evidence must be excluded on the ground of inadmissibility. The record itself is a very lengthy one and it would be futile for us to indicate which portions in particular fall within this category. All the evidence dealing with questions of character, administration of the camp, other Court proceedings, the sort of man defendant might be, the likelihood of his acting in a certain way must be excluded from consideration. We have endeavoured to direct our attention only to such portions of the evidence relating to the issue directly before the Court.

On the merits of the case.

In this respect we find that there is sufficient evidence to indicate that plaintiff, together with some forty or more other persons were taken into custody by defendant or his agents to await the arrival of an official of the Native Commissioner's staff for the purpose of paying certain water rates. We find that the defendant or his agents took these persons into custody for the reason that they alleged or suspected that they had not paid their water rates.

In regard to plaintiff in particular we can find no reason to doubt that he was put in custody by defendant when he (plaintiff) made inquiries about the "arrest" of his wife.

We find also that defendant had no greater duty than that of an ordinary citizen of the Union to arrest another person in certain circumstances and that the reason or cause for plaintiff's arrest, ostensibly for non-payment of water rates, did not fall within the circumstances prescribed by Statute. The "arrest" of plaintiff was therefore unlawful.

The question of malice in this case is somewhat difficult to assess. There is no evidence whatever that plaintiff was expressly singled out for attention by defendant. He was only one of a large number of persons taken into custody and he does not appear to have been treated differently from the others. McKerron on the Law of Delict has this to say on the subject of malice:—

> "The plaintiff must prove that the defendant was actuated by malice. By malice is to be understood 'not necessarily personal spite and ill-will, but any improper or indirect motive'. Thus, in the wrong of malicious prosecution malice may be defined as some motive other than a desire to bring to justice a person whom one honestly believes to be guilty. To institute criminal proceedings in order to further a civil remedy is clearly to act from an improper motive. On the other hand it should be observed that anger is not in itself an improper motive; on the contrary, as is pointed out by Cave, J., in Brown *v.* Hawkes, 'it is one of the motives on which the law relies to secure the prosecution of offenders against the criminal law'. Difficulty may be created by the fact that defendant's motives were mixed. Where this appears to have been the case, the Court must endeavour to ascertain which was the dominant motive by which he was actuated."

According to the admissible evidence in this case the only object for the arrest of the persons involved was to ensure the payment of water rates. Though the arrest was unlawful there is no suggestion that defendant honestly did not believe his actions to be in order. There is no evidence to suggest that the motive was to injure the plaintiff or the others in their reputations. To quote again from McKerron:—

> "It is an actionable wrong to institute criminal proceedings against any person maliciously and without reasonable and probable cause. But to entitle the plaintiff to succeed in an action for malicious prosecution he must show, either that the institution of the proceedings caused him actual pecuniary loss, or that the charge was of such a nature that it was calculated to injure his reputation. Thus, a charge which is not of a scandalous nature and which can result in the imposition of a fine only, e.g., a prosecution for the breach of a municipal by-law in parking a motor car in a prohibited parking area, will not ground an action for malicious prosecution, unless it causes actual pecuniary loss.

Award of damages.

In attacking the Native Commissioner's award of £50 damages as exorbitant and excessive Mr. Brodie has submitted that the award was more in the nature of a fine on defendant than an assessment of the damages suffered by plaintiff, as contumelia, in the impairment of his dignity. The Native Commissioner's remarks in his reasons for judgment are as follows:—

> "In this country of ours the freedom and the liberty of the individual are very highly prized possessions and they must be protected. Liberties may be curtailed by statute or otherwise, but no one can deprive another of his freedom of movement without running the risk of damages, unless he has a legal right to do so, and even where he has such a right, he must not exceed it or exercise it unlawfully or spitefully.

"Whilst commending the defendant on his administration in general in that under the most trying circumstances imaginable, such as finding thousands of people suddenly drawn together, with no legal claims, houses, sanitation or streets, or even State policemen to assist in the keeping of law and order, and with a Supreme Court ejectment order hanging over their heads, he nevertheless succeeded in turning chaos into a reasonable township and while I appreciate all the attendant difficulties he has had to cope with and the reason why he has done so, I feel that the liberty of the individual should be protected. The defendant has gone too far. He must be stopped from arrogating to himself powers which would have the effect of usurping the functions of the State. He has no power of arrest conferred upon him by statute or by delegated authority, so he is an ordinary individual as far as that is concerned and he has exercised wanton authority."

In all the circumstances the Court awards the plaintiff £50 damages and costs of the action.

Even on this view of the case, based, be it remembered, largely on evidence which should not have been admitted, we feel that the Native Commissioner might have awarded nominal damages. The award of £50 does seem to support Mr. Brodie's contention that it was against defendant's high-handed action rather than in favour of plaintiff's injured reputation. "Damages are said to be nominal where they are awarded" not by way of compensation for any actual loss suffered but merely by way of recognition of some legal right vested in plaintiff and violated by the defendant" (McKerron). In the circumstances of this case the award of exemplary damages does not appear to be warranted. We can find no evidence of express malice in this case. We cannot find that, on the admissible evidence, defendant's action was high handed. It was unlawful but done in circumstances where much could be said in mitigation. Undoubtedly the Native Commissioner was influenced in his judgment by the great mass of evidence directed to show what sort of man the defendant was and the likelihood of his acting in the manner suggested in the summons. It is not the function of the Courts to speculate on hypothetical propositions nor to predict what might have happened. The Court must determine what in fact did happen. We must discount all these irrelevant factors. We feel that justice will be done if we reduce the claim to its minimum, recognition of plaintiff's legal right to immunity which was violated by defendant.

In our view an award of £10 would have been appropriate.

The Appeal is allowed with costs and the Native Commissioner's judgment is altered to read: "For plaintiff for £10 damages and costs of suit."

For Appellant: Adv. J. Brodie, instructed by Messrs. Gratus, Sacks & Bernard Melman.

For Respondent: Mr. Helman of Messrs. Helman & Michel.

MARRIED WOMAN: EJECTMENT.

CASE No. 28 OF 1950 (JOHANNESBURG).

JOSEPH MARSHALL *v.* **LENA CHAKA.**

JOHANNESBURG: 24th October, 1950. Before H. F. Marsberg, Esq., President, Messrs. W. J. M. Norton and E. V. C. Liefeldt, Members of the Court.

Ejectment—Married woman—Alleged tenancy in third person—Onus of proof on defendant—Absolution from the instance—Not competent when defendant fails to discharge onus—Non-joinder.

Claim: Order of ejectment.

Plea: Defendant alleges lawful residence through tenancy of third person.

Judgment: Absolution from the instance.

Appeal: Judgment incompetent.

Held:

(1) As defendant fails to discharge onus judgment must be given to plaintiff.

(2) Position of married women considered.

Appeal allowed.

Judgment altered to read: For plaintiff as prayed.

Authorities:

McKerron on the law of Delict.
Graham *v.* Ridley, 1931, T.P.D., 476.
Pool *v.* Alexander, 1910, 20, C.T.R., 174.
Benjamin Daniel Seholi *v.* Jacob Ralilodi, 1949, N.A.C. (C.D.), 21.
Oosthuizen *v.* Miller, 1908, 18, C.T.R., 890.
Welsh *v.* Harris, 1925, E.D.L., 298.
Arter *v.* Burt, 1922, A.D., 303.
Scoble on Evidence, 2nd Edition, 142.
Wille and Milne: Mercantile Law, 11th Edition.
Excell *v.* Douglas, 1924, C.P.D., 472.
Fraser on husband and wife. Jones and Buckle, page 263.
Jokwana *v.* Makobone, 14, E.D.C., 2.
Rex *v.* Mboko, 1910, T.P.D., 445.
Mashja Ebrahim *v.* Mahomed Essop, 1905, T.S., 61.
Act No. 21 of 1943.
Nathan, Law of Torts.
Malan N. O. *v.* Minister of Finance, 1913, O.P.D., 44.

Marsberg (President), delivering the judgment of the Court:—

In the Native Commissioner's Court at Johannesburg, plaintiff, Joseph Marshall, a native, sued defendant, Mrs. Lena Chaka, for an order of ejectment against her and all persons claiming title through her from certain portion of premises situate at 15 Gerty Street, Sophiatown, Johannesburg. In his particulars of claim plaintiff alleged:—

1. Plaintiff is the owner of certain premises situate at 15 Gerty Street, Sophiatown.
2. Defendant is in wrongful and unlawful occupation of certain portion of the said premises.
3. Notwithstanding due demand, the defendant fails, neglects and/or refuses to vacate the said premises.

Defendant pleaded as follows:—

1. The defendant is unable to admit or deny the allegations contained in paragraph 1 of the summons and puts the plaintiff to the proof thereof.

2. The defendant denies each and every allegation contained in paragraph (2) and in particular denies that she is in wrongful occupation of the said premises. The defendant states that one Solomon Chaka is the lawful tenant of the said premises and that defendant is residing on the premises with his permission and consent.

3. Defendant repeats that Solomon Chaka is the lawful tenant of the said premises and that defendant is residing on the said premises with said Chaka's knowledge and consent. Defendant says in the premises the said Chaka should have been joined as defendant.

4. The defendant admits demand and refusal to vacate but denies that plaintiff is entitled to eject her from the said premises.

In view of the turn of events in this case it is necessary to consider the pleadings to ascertain the issues before the trial Court. On the face of the summons the cause of action is clearly founded in delict or tort. The plea, however, by alleging lawful tenancy would suggest that the cause of action was based on contract, an agreement of lease. McKerron on the Law of Delict has this to say:—

> "A plaintiff, it should be noted, who has alternative claims, or who is doubtful whether his remedy is in contract or in delict, may frame his action in the alternative. If he adopts this course, it seems that he may reap the benefit of whichever claim he establishes to be the substantial one, and that if both prove to be substantial, he gets advantages attendant upon the superior claim. In determining which of the claims is the substantial one, or whether both are substantial, the Court must look at the substance of the matter and not merely at the technical form of the pleadings."

This statement of the law will be of importance in the final determination of this case. In the case of Graham *v.* Ridley, 1931, T.P.D., 476, it was held, on the question of pleading, that "where an owner of property sues for ejectment his real cause of action is simply the fact that he is owner and therefore *prima facie* entitled to possession. Consequently, an allegation in his summons that he has granted defendant a lease which is terminated is merely a convenient way of anticipating defendant's plea that he is in possession by virtue of a lease, and is not strictly necessary to the cause of action. If, therefore, one ground of termination of the lease is relied on in plaintiff's summons and another ground in his replication, this does not amount to introducing a new cause of action into the replication". In answer to the plea in the present case, plaintiff denied that Solomon Chaka was a tenant. We see, therefore, on the pleadings that plaintiff adhered to his substantial cause of action, the claim for ejectment, based on the fact of his ownership of the property. The question of ownership was not in serious dispute, even on the pleadings and it was tacitly accepted as a fact, by the defendant's allegation that Solomon Tshaka was a tenant. At the outset, then, the real cause of acion was that plaintiff was the owner of the property and therefore *prima facie* entitled to possession by defendant's ejectment. The onus to resist this claim rested on defendant. The Native Commissioner so held and defendant accepted the onus. The case of Pool *v.* Alexander, 1910, 20, C.T.R., 174 is in point.

> "Where, by way of defence to an action by the owner of premises for ejectment, the defendant set up a six months' lease, but failed to prove the existence of such lease to the

satisfaction of the Magistrate who tried the case. *Held:* on appeal that the Magistrate should have given judgment for plaintiff instead of absolution from the instance."

As several other issues were raised in the appeal before us, it might be convenient to dispose of the merits of the case at this stage. One of the grounds of appeal is that the Native Commissioner erred in granting absolution from the instance after he had found that defendant's evidence was unreliable and that she had not discharged the onus which rested on her. In view of the decision in Pool's case, the Native Commissioner was clearly wrong. We have carefully considered the evidence, in the light of arguments from both parties' Counsel before us and we accept the Native Commissioner's statement in his reasons for judgment that " Judgment for the defendant was also not merited". Defendant's evidence is indeed unsatisfactory and was correctly rejected by the Native Commissioner. As we have pointed out the onus in this case rested on defendant and as she failed to discharge it, the appeal, on this ground alone, must succeed. Judgment should have been given in favour of plaintiff. The Native Commissioner appears to have been surprised at the proposition that a judgment of absolution cannot be given in a case where on the pleadings the onus is on defendant and the onus is not discharged. The following cases, among others, are authorities:—

Benjamin Daniel Seholi *v.* Jacob Ratilodi, 1949, N.A.C., Central Division, 21.

Oosthuysen *v.* Miller, 1908, 18, C.T.R., 890.

Welsh *v.* Harris, 1925, E.D.L., 298.

Arter *v.* Burt, 1922, A.D., 303.

Three points were taken by Mr. Lakier who appeared for respondent (defendant):—

1. That the onus on the pleadings was on plaintiff, not on defendant.
2. Non-joinder. Defendant's husband should have been joined as a co-defendant.
3. On the merits the Native Commissioner's judgment of absolution was correct.

1. *Onus:* Sufficient has already been said above to show that on the pleadings the onus was correctly placed on the defendant.

2. *Non-joinder:* Nowhere in the pleadings is there any specific allegation that defendant, Mrs. Lena Chaka and Solomon Tshaka or Chaka are husband and wife. The wording of defendant's plea is rather peculiar. She states that Solomon Tshaka is the lawful tenant and that she is residing on the premises with his " permission and consent " and again with his " knowledge and consent ". If the wording of the plea, which was drawn up by an attorney, was deliberate and intentional then it should be construed strictly, and it could fairly be held to mean that there was no marital relationship between Solomon and Lena. If they were in fact husband and wife then she would have the absolute right to be and reside with her husband. She would not require his permission or knowledge or consent to stay with him. Viewed in retrospect, in the light of the evidence adduced in which the incidental question of their marital relationship was investigated with its eventual uncertainty, it is difficult to resist the conclusion that defendant purposely refrained from alleging the existence of a marriage between herself and Solomon. Again, in her plea she said: " Defendant says that in the premises (i.e. that she was residing there with Slomon's knowledge and consent) the said Tshaka should have been joined as Defendant ". If, here, her intention was to claim the protection accorded by law to married women she should have claimed that Solomon should be cited as defendant or that she should be cited as defendant, " duly assisted by her husband ". In claiming that

Solomon should be joined as defendant or co-defendant there is a tacit admission that she and Solomon were independent persons. The point was taken by Mr. Helman, for appellant (plaintiff) that the question of defendant's *locus standi* was not raised in the pleadings and that defendant was estopped from relying on this defence. Exhibit E, a letter written on her behalf by the Legal Aid Bureau before summons was issued, was referred to in support of his contention. In this letter, dated 31st August, 1949, addressed to plaintiff, the Legal Aid Bureau wrote " I am advised by bearer, Lena Chaka, that she is a tenant in occupation of your premises and that although she has committed no breach of her contract with you . . . ." Nowhere in this letter is there any reference to Solomon Tshaka or that he is her husband or in fact that she is married at all. Whatever the purpose may have been in leaving the meaning of the plea uncertain, the inference that Mrs. Lena Chaka was the wife of Solomon Chaka can be drawn only by the most liberal method of interpretation. She may have been a widow or his sister-in-law. Certainly it cannot be said that the question of *locus standi* on the ground that she was a married woman was raised or put directly in issue or that it can fairly be inferred from the pleadings. Against this contention was urged the proposition that plaintiff was fully aware of the marital status of defendant by his own action in directing the summons to " Mrs." Lena Chaka and his subsequent evidence, throughout which he referred to Solomon and Lena Chaka as husband and wife, indicating that at all material times he well knew that they were husband and wife. It was urged that plaintiff is now estopped from denying that they are not married. This argument is, however, more apparent than real. At the end of the case it was by no means clear that Solomon and Lena were in fact married. That much is to be deduced from their own testimony. That plaintiff stated throughout the proceedings that they were husband and wife could not make them married, if they themselves declared that they were not. If anything, defendant was benefited rather than prejudiced by plaintiff's belief. Estoppel would then not apply. This argument and reasoning, however, appear to be irrelevant. The main issue before the trial Court was a claim for ejectment, not the marital status of defendant. It might be in point here to quote the rule relating to Estoppel. Scoble, 2nd Edition, at page 142:—

> " Where a party intentionally leads another to believe that a certain state of facts exist and the latter, on that assumption, alters his legal position to his prejudice, the former will afterwards be precluded from denying that those facts do, in truth, exist."

Plaintiff assumed a set of facts which did not in fact exist but which are to the benefit of defendant. She was not thereby prejudiced in substance, but merely by formality. Defendant postulated a set of facts which in truth did exist and on which plaintiff, in fact, though mistakenly, did act. He would be prejudiced if the Court held that his action was misconceived in that he failed to join Solomon as defendant and now dismissed his summons.

In regard to the question of non-joinder raised in the plea, plaintiff stated that if defendant wished to join Solomon as a co-defendant, plaintiff would have no objection. No application was made and Solomon was not joined. As a person having an interest in the proceedings, he could validly have applied to be made a party to the action. As transpired in the evidence Solomon denied that he was married to Lena and he may have had a good reason, therefore, for declining to intervene in the action. There is another good reason. If, in fact, he were not married to Lena and consented to be joined as co-defendant, he would, in the event of losing the case be liable for costs. If the pleadings do not disclose what was in the minds of the parties when action was joined then the Court would be justified in ensuring that no undue advantage should be gained by any

party for want of frankness and certainty in stating the issues. No relief should be given to him who by misleading statements has endeavoured to obtain a tactical advantage over the other. On balance, therefore, it would appear that in the light of all the evidence no substantial prejudice has been suffered by defendant because Solomon Tshaka was not joined as a party. Solomon was an important witness in the case. He gave lengthy evidence. His evidence covered all the factors dealing with his relationships with Lena and the issues actually forming the subject matter of the summons and plea. To all intents and purposes, therefore, in fact he actually intervened in the action as effectually as if he were a party. His intervention could not have been more complete if he had been cited as defendant or in his capacity as assisting Lena.

But the matter still requires consideration from the point of view that defendant was, or may have been a married woman.

Married Women.

Wille and Milne: Mercantile Law, 11th Edition.

> " Married women, as a general rule, are incapable of contracting. But this rule depends on the ' marital power ' which, under the common law, a husband possesses over his wife; but which may be excluded by agreement between the parties made before the marriage. Marriages in South Africa may be entered into with or without an ante-nuptial contract. In the absence of any ante-nuptial contract the spouses are married in community of property, and of profit and loss, and the husband obtains the marital power. The consequences of such a marriage is that the property of each spouse falls into a common stock over which the husband has unfettered control, including the right to dispose of it without in any way consulting his wife. At the same time the previous liabilities of each spouse become the joint liability of both. The wife is regarded as a minor under the guardianship of her husband; she has no contractual capacity and can neither institute an action at law nor be sued alone. Consequently, a contract made by the wife is not binding on her or on her husband unless she acted as his agent, and was appointed by him expressly or impliedly (Rautenbach *v.* Groenewald, 1911, T.P.D., 1150; Excell v. Douglas, 1924, C.P.D., 472)."

In the case of Excell *v.* Douglas the position of married women was extensively investigated, and the law quoted by the learned authors appears to be based on this case. It is to be noted that Excell's case was based on contract, the supply of household necessities to a wife living apart from her husband. It is clear from this case that the right of a wife to bind her husband's credit for household necessities holds only when there is a common household. Whether this right flows as an incident of marriage itself or rests on implied agency was not decided, though the effect in either case would be the same. A quotation from Fraser on *Husband and Wife* that according to the law of Scotland where husband and wife live apart by mutual consent and the wife is possessed, either from her husband or from other sources, of adequate means of support according to her situation, the law gives no remedy against the husband, was stated to be sound principle and not inconsistent with the Roman Dutch Law. The wife's rights are therefore not unlimited. It is clear that the wide general rule is subject to variation. But this is at least clear, that the term " married woman " refers only to a woman who is married as understood in the Common Law. In Jones and Buckle at page 263 it is stated:—

> " Of course the phrase ' married woman ' is used throughout in the strict legal sense: a woman married only according to Native Custom may sue and be sued as a *feme sole*.
>
> Jokwana *v.* Makobone, 14, E.D.C., 2.
>
> Rex *v.* Mboko, 1910, T.P.D., 445.

and a marriage which is Mahommedan and therefore polygamous is no marriage.

Mashia Ebrahim *v.* Mahomed Essop, 1905, T.S., 61."

Jokwana's case is difficult to associate with the statement of the learned authors. Mboko's case dealt with the compellability of a native woman married according to cusotm to give evidence against her husband. But the privilege of married women was dealt with fully. In the course of the case the following declaration by the Chief Justice was made:—

> " All reputed wives are held to be legal wives till the contrary is proved; but when it is established that a reputed wife is not as a fact a legal wife, then that rule ceases to operate."

The Supreme Court of the Transvaal has decided in a number of cases that a woman married according to Native Custom is not a " married woman " under the Common Law. This was made clear in the case of Mashia Ebrahim *v.* Mahomed Essop, 1905, T.S., 61, which was quoted with approval in Mboko's case. In Ebrahim's case we find:—

> " Now, it is quite certain that if this marriage were a polygamous one it would not be recognised in this country, no matter whether it were recognised as valid in other countries or not. With us, marriage is the union of one man with one woman, to the exclusion, while it lasts, of all others; and no union would be regarded as a marriage in this country, even though it were called and might be recognised as a marriage elsewhere, if it was allowable for the parties to legally marry a second time during its existence."

Native customary unions are polygamous because it is allowable for the husband to marry other wives.

We are now faced with these facts. Defendant in this case claimed that she was married according to Native Custom. The Supreme Court has declared that such a union is not a " marriage ", nor can defendant be a " married woman " in the eye of the Common Law. This case is one which must be determined under the Common Law. The implications of Native Law cannot be invoked. To all intents and purposes defendant is a *feme sole* and does not enjoy the protection afforded to " married woman " under our law. She was therefore correctly sued in her individual capacity, even if she were validly married to Solomon Tshaka by native custom. Her position is, however, not so strong because the Native Commissioner found:—

> " The defendant and her alleged husband told conflicting stories regarding their marriage. So much so that there is some doubt that a customary union exists at all."

We agree with the Native Commissioner's finding which is borne out by the evidence. Even, in fact, therefore, as transpired at the end of the case, defendant failed to establish any claim for protection as a " married woman ".

The only protection of which we are aware is that accorded to native women by virtue of Act No. 21 of 1943 which provided that:—

> " A native woman who is a partner in a customary union and who is living with her husband, shall be deemed to be a minor and her husband shall be deemed to be her guardian."

No protection under this enactment was claimed by defendant, nor does the point appear to have been in the contemplation of the parties nor was it dealt with at all in this case. As we have pointed out defendant failed to establish that she was married by custom to Solomon and we could come to her relief only if we were satisfied that injustice had been done. Having failed to establish as a fact that she is a legal wife, any presumption based on repute falls away.

Assuming in her favour that she is a minor it remains to consider her position on this claim based on delict. On the evidence in this case she and Solomon were in the position of trespassers on plaintiff's property.

From Nathan's Law of Torts we find:—

> " It must be noted that a minor cannot be personally sued for a tort but the action must be instituted against his guardian, natural or dative, if he has one. If there is no guardian to defend the suit, the plaintiff must apply to the Court for the appointment of a *curator ad litem* to the minor, to defend the suit on his behalf. A father must be sued in his capacity as guardian of his minor child and cannot be sued personally, *for he is not personally responsible in damages for the torts of his minor child.*"

> " But as soon as a person possesses the faculty of reasoning and it can be inferred from an act which he commits against another person that it has been done by design and with evil intent such act is a delict; and the person guilty of it, although he has not yet attained the age of manhood, contracts an obligation to make reparation for the damage he has caused."

It is clear that defendant was personally liable for the tort. Solomon, even if he were her husband, would not be liable. The utmost relief, therefore, that might have been available to defendant was one of mere formality, i.e. that she should be sued indirectly through her gaurdian. That procedure would not absolve her from personal liability to reparation, if judgment went against the guardian. In effect, therefore, no substantial prejudice has been suffered by defendant by virtue of her being sued personally. No injustice has been done. The merits of the case were fully debated. She had a fair trial and was represented by a legal practitioner throughout. Solomon, in fact, rendered all the assistance possible, as effectually as he could, had he been formally joined as a party to the action. In tort, the defect is cured if the husband appears and joins his wife in giving a power to sue or be sued, Malan N.O. *v.* Minister of Finance, 1913, O.P.D., 44. It would be a travesty of justice to set aside the proceedings, merely because the record lacks the formal declaration that defendant is sued "assisted by her husband". On the merits, plaintiff is entitled to the relief sought.

A point was argued that a Court should not give a judgment which would have the effect of separating a husband and wife. This was based on one of the essential consequences of marriage, viz. that a husband and wife must live together. This reciprocal obligation, however, is a duty as between the parties themselves. No legal duty is cast on third persons or the community at large to ensure that particular married couples live together. Nor can there be any substance in the argument. In the Criminal Courts many thousands of married couples are separated by judicial pronouncement. And so in the Divorce Courts. If a woman does a wrongful act she can claim no legal immunity merely on the grounds that she is married.

3. We have sufficiently dealt with the third point argued by respondent, that on the merits the Native Commissioner's judgment of absolution was correct. On the Native Commissioner's own view of defendant's evidence he was obliged to find in favour of plaintiff, because defendant had failed to discharge the onus resting on her.

It is of interest to note that the complications in this case rest on one word, the description of defendant as " Mrs. ".

The appeal is allowed with costs and the Native Commissioner's judgment is altered to read:—

" For plaintiff as prayed with costs."

E. V. C. Liefeldt (Member): Concurred.

W. J. M. Norton (Member): Dubitante.

While I am in general agreement with the judgment in this case, I am doubtful of the correctness of giving a judgment which may have the effect of separating man and wife.

The question whether Solomon and Lena are in fact man and wife (which means by Christian rites) or partners in a Native customary union, was not in issue, although it is of importance.

Both Solomon and his wife said they were and were not " married ". The Natives have a special word for marriage in church, and it is possible that loose use of the word " married ", or the interpretation, may have led to these contradictions. Plaintiff (appellant) certainly regarded these two as man and wife, and on the evidence their actual status remains an open question. It appears from his own evidence that plaintiff intended to sue for the ejectment of Solomon and Lena together, and no explanation was offered why he actually seeks to eject them singly. Ejectment of one will bring him no nearer being in possession of his property.

I feel that recourse to the formality of the law regarding the *locus standi* of a married woman, whether married by Christian rites or Native Custom, or merely by cohabitation and repute, is unsound in principle in a case of this nature. The authorities in dealing with the invariable consequences of marriage, place first in the first invariable consequence that the parties shall live together, and this is the case also in respect of marriages by Native Custom. Further, it is fundamental that the husband chooses the residence, and failure by the wife to reside with the husband at the place of his choosing is so grave a breach of the contract as to justify its dissolution.

I feel therefore, that an action for ejectment is essentially one in which the paterfamilias must be sued, and if the action is successful all the members of the household must leave the premises concerned. It is inconceivable that a wife, whatever the terms of her antenuptial contract, could persuade the Courts that an order of ejectment from residential premises, made against the husband, did not apply to her.

However, defendant (respondent) did not avail herself of the possible defences arising from status, but sought to establish a contract between plaintiff and Solomon. I agree that she failed therein. As she had the services of a legal practitioner her failure to plead her status cannot be regarded as due to ignorance, and although the Courts will go a long way to assist an ignorant litigant, in this case there appears to be no justification for denying plaintiff his judgment, although it may have undesirable consequences.

For Appellant: Mr. H. Helman, of Messrs. Helman & Michel.

For Respondent: Adv. P. Lakier, instructed by Messrs. Gratus, Sacks & Bernard Melman.

MUNICIPAL LOCATION POLICE: ASSAULT.

CASE No. 29 OF 1950 (VEREENIGING).

MAMODIE DINAKANE *v.* CONSTABLE LETSATSI.

JOHANNESBURG: 24th October, 1950. Before H. F. Marsberg, Esq., President, Messrs. W. J. M. Norton and E. V. C. Liefeldt, Members of the Court.

Assault—Damages—Municipal Location Police—Peace Officers—Powers of.

Claim: £100 damages for wrongful and unlawful assault:—

(*a*) Special damages £1. 16s.

(*b*) Pain and suffering £98. 4s.

Plea: Denial.

Judgment: For defendant.

Appeal.

(*a*) On fact.

(*b*) Bad in law in that Native Commissioner should have held that defendant had no right to enter plaintiff's house. That plaintiff had the right to prevent defendant entering house. That by taking hold of plaintiff's hands defendant committed assault on plaintiff.

Held:

(1) Facts support Native Commissioner's finding.

(2) Defendant was a Peace Officer and empowered to enter premises to arrest person suspected of committing crime.

(3) Defendant justified in law to enter plaintiff's premises and to hold plaintiff when she obstructed him.

Appeal dismissed.

Authorities:

Nzoyi *v.* Germiston Municipality, 1928, C.P.D., 472.
Rex *v.* Mahlatse, 1949 (4), S.A. Law Reports.
Gardiner and Landsdown: 166, 170.
Rex *v.* Jackelson, 1926, T.P.D., 685.
Rex *v.* Karvie, 1945, T.P.D.
Rex *v.* Moropedi, 1946, T.P.D.
Ho'si *v.* Vernon, 1909, T.S., 1074.

Marsberg (President), delivering the judgment of the Court:—

In the Native Commissioner's Court at Vereeniging, plaintiff, Mamodie Dinakane, sued defendant, described as Constable Letsatsi, for £100 damages for wrongful and unlawful assault at Meyerton Location on 28th May, 1949. The details of the alleged assault are as follows:—

> "Defendant *grabbed* plaintiff and pulling her out through the front door of her house, threw her on some rocks and knelt on her. He punched her on her body and face."

The particulars of the amount claimed are:—

	£.	s.	d.
(*a*) Medical expenses	1	1	0
(*b*) Travelling expenses to Johannesburg		15	0
(*c*) Pain and suffering	98	4	0

Defendant totally denied all the allegations and that any damages were suffered.

After trial the Native Commissioner gave judgment in favour of defendant with costs. Against this judgment an appeal has been noted by plaintiff on the grounds that the judgment is against the evidence and the weight of evidence and is bad in law in that the Native Commissioner should have held that the defendant had no right to enter the plaintiff's house, that the plaintiff had the right to prevent the defendant entering her house and that in consequence the defendant by taking hold of the plaintiff's hands committed an assault on her.

We do not propose to deal with the alternative ground of appeal, viz. that the Native Commissioner should have given a judgment of absolution from the instance because, in the view which we take of the case, this ground will fall away.

The Native Commissioner found the following facts to be proved:—

1. Plaintiff visited Dr. Freed about 28th May, 1949, and was attended to by Dr. Berman.
2. Plaintiff was examined by Dr. Williams in Johannesburg on 16th June, 1949.
3. The defendant had contact with the plaintiff on the 21st May, 1949.
4. The defendant reached plaintiff's house shortly after arrival of his subordinates.
5. The constables asked plaintiff where her husband was, demanded admission and it was refused.
6. Plaintiff offered resistance and obstructed the police in their endeavour to arrest Makhaloane.
7. Plaintiff was held by her hands by defendant and was taken to Superintendent's office.

We consider these findings to be amply justified by the evidence. There is, in the first place, an important discrepancy in regard to the alleged date of the assault. Contact between plaintiff and defendant admittedly took place on 21st May, 1949. The summons alleges the date to be the 28th May, 1949. But the matter can be passed as a wrong statement of fact. Then, there is another important discrepancy between plaintiff's evidence as to the nature of the injuries sustained by her on the day in question and the report of the Johannesburg Dr. Williams who examined her on the 16th June, 1949, that is 19 days later. Plaintiff stated: "I had no wounds but bruises on my back as result of assault. I was also bleeding from the nose." Dr Williams, however, reported:—

> "Several linear scars approximately 3 to 4 centimetres in length just below and medial to centre of right shoulder blade. The scars are superficial and healed."

Now, it is quite impossible to reconcile these two statements. The lapse of time between the alleged assault and the date of medical examination must be borne in mind. Plaintiff apparently did not consult any doctor at Vereeniging in regard to her injuries but waited some time before consulting one in Johannesburg. When viewed in the light of the defendant's version of the event, that she was merely held by the wrists it is difficult to resist the conclusion that the plaintiff's is a trumped up story. The defendant and his witnesses are all public officers and it would be unlikely that their statements would be untruthful. On a review of the evidence we are satisfied that the Native Commissioner's finding that plaintiff was held by her hands by defendant was correct and that she was not assaulted as alleged in her summons.

As we have frequently pointed out in an appeal on questions of fact the appellant must show that the judicial officer was mani-

festly wrong in his judgment. The Native Commissioner accepted the defendant's version of the story and we consider he was justified in doing so.

The other ground of appeal is whether defendant's action in holding plaintiff by her wrists was lawful. The surrounding circumstances here are these. Defendant and other policemen under the control of the Municipal Location Superintendent were on a general raid in the location at Meyerton. When they came to plaintiff's house they asked where her husband was. She replied that he was in her room. According to plaintiff, defendant then instructed the constables to break down the door of the room and arrest her husband. Again, according to her evidence she admitted that the Superintendent had said he did not want Makholoane (her alleged husband) there. "On 21st May, 1949, he was warned by Magistrate not to be on the stand and in location of Meyerton and since then he was not there". "After date of assault, viz. 28th May, 1949, Makholoane was again brought before Court and instructed not to enter Meyerton Location. He was fined £1." Defendant himself stated that he had arrested this man more than three times before for being on this stand because he had no lodger's permit to be there. It is clear therefore that at the time of the alleged assault both plaintiff and defendant knew that Makholoane had no right to be on the stand. The constables demanded entry to effect his arrest.

The point was raised by Mr. Kentridge for appellant that these policemen were not peace officers. It is common cause that they were acting under the authority of the Location Superintendent. According to the case of Nzoyi *v.* Germiston Municipality, 1928, T.P.D., 472, which has been followed in the case of Rex *v.* Mahlatse, 1949 (4), S.A. Law Reports, 455, such policemen are peace officers. We see no good reason to hold the contrary. A peace officer may arrest without warrant any person committing an offence in his presence. Of course a police officer or other person proposing to make an arrest is not entitled forcibly to enter private premises merely because of the expectation that an offence will there be committed in his presence. But that was hardly the case here. By previous knowledge the defendant knew that plaintiff's alleged husband had no lawful right to be on the premises or indeed in the location. When, therefore, he demanded to enter the premises to arrest this man, he was acting lawfully, and plaintiff had no right to obstruct defendant in the execution of his duty. The holding of plaintiff by her wrists after she had begun actively to obstruct the police in the execution of their duty, was therefore justified and did not constitute an assault.

The appeal is dismissed with costs.

For Appellant: Adv. S. Kentridge instructed by Messrs. Helman & Michel.

For Respondent: Adv. G. A. Coetzee instructed by Messrs. Smit & Malan.